APPENDIX A

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

No. 06-7070

[Filed November 1, 2007]

WILLIAM JAMES DIESTEL,)
Petitioner-Appellant,)
)
v.)
)
REGINALD HINES, Warden,)
Lexington Correctional Center,)
Lexington, Oklahoma,)
Respondent-Appellee.)
)

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 03-CV-170-JHP)

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Keeley Lane Harris, Assistant Attorney General (W.A. Drew Edmonson, Attorney General, with him on the brief), Oklahoma City, OK, for Respondent-Appellee.

Before HENRY, LUCERO, and HARTZ, Circuit Judges.

HARTZ, Circuit Judge.

William James Diestel was convicted of first-degree murder in Oklahoma state court. After the Oklahoma Court of Criminal Appeals (OCCA) affirmed his conviction, he filed in the United States District Court for the Eastern District of Oklahoma an application for habeas relief under 28 U.S.C. § 2254, raising two claims: (1) the state did not present sufficient evidence to prove beyond a reasonable doubt that he was sane at the time of the offense, and (2) his due-process rights were violated because the court did not instruct the jury about the consequences of a verdict of not guilty by reason of insanity. Although a magistrate judge recommended that relief be granted on the first of these claims (sufficiency of the evidence), the district court denied relief on both claims. Mr. Diestel appealed. We have granted a certificate of appealability (COA) on both claims. *See* 28 U.S.C. § 2253(c)(1) (requiring a COA to appeal denial of habeas application).

We have jurisdiction under 28 U.S.C. § 1291 and affirm. On the first issue, we hold that there was enough evidence at trial for the jury to find beyond a reasonable doubt that Mr. Diestel could distinguish right from wrong at the time of his offense. On the second, we hold that the OCCA's decision was not contrary to federal constitutional law set forth by the United States Supreme Court.

I. BACKGROUND

A. The Killing

The facts of the killing are substantially undisputed, except for Mr. Diestel's state of mind at the time. In October 2000 Mr. Diestel traveled from California to Oklahoma to seek out the victim, Doug Casey, a former acquaintance from Santa Paula, California. On October 27 he stopped at the home of Helen Scott and asked for directions to the Casey residence. About 11:45 a.m. he arrived at the Casey residence and spoke to Carolyn Casey, the victim's mother, saying that he was Doug Casey's friend. She told him that Casey was at work at the Chickasaw Point Golf Course.

Mr. Diestel went to the golf course and inquired about Casey. Upon being informed that Casey would be working a while longer, Mr. Diestel waited at a restaurant at the golf course. When Casey came into the restaurant with a colleague before his workday ended, Mr. Diestel appeared to be using a newspaper to hide himself from Casey's view.

Casey clocked out of work between 2:30 and 3:00 p.m. and headed for the parking lot. Mr. Diestel approached him and said, "[D]o you remember me?" Supp. R. Vol. II at 303. Casey responded, "[O]h shit!" and ran away. *Id.* Mr. Diestel drew a gun and fired several times. After Casey had rounded a corner and was out of sight, Mr. Diestel returned to his car and left the area. Casey had been shot in the neck; the bullet severed his carotid artery, and he bled to death.

Local police were informed of the shooting, and Mr. Diestel was soon stopped by Sergeant Duke Remington of the Kingston Police Department. Mr. Diestel got out of his car and put his hands in the air before Remington was able to stop his own vehicle. When Mr. Diestel was arrested, he said that he had shot Casey because Casey had raped a girl and set fires in California. He then asked about Casey's condition, telling another officer that he had not intended to kill him.

B. The Trial

At trial Mr. Diestel did not deny the shooting; instead, he claimed that he was insane at the time. Under Okla. Stat. tit. 21, § 152(4), people are not capable of committing crimes if they are "temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness." In evaluating claims of insanity Oklahoma courts have held that "a defendant was legally insane if during the commission of the crime he was suffering from a mental disease or defect rendering him unable to differentiate between right and wrong." *Pugh v. State,* 781 P.2d 843, 844 (Okla. Crim. App. 1989) (internal quotation marks omitted). This is part of the M'Naghten test, which also states that a defendant is insane if suffering from a mental disease or defect "rendering him . . . unable to understand the nature and consequences of his acts." *Id.*

Mr. Diestel's defense was that he could not tell right from wrong because he was afflicted with paranoid schizophrenia. He claimed that this disease caused him to hallucinate that he was visited by angels and to have delusions that Casey embodied the evil Emperor Nero, whom Mr. Diestel needed to apprehend. In support of this defense, Mr. Diestel called several members of his family to testify about his history of mental illness. He also called two mental-health experts, one of whom, Dr. John R. Smith, testified that Mr. Diestel was legally insane because he could not distinguish right from wrong at the time of the shooting.

We summarize the relevant trial testimony in some detail.

1. Lay Witnesses

a. State's Witnesses

The state called several witnesses who described Mr. Diestel's behavior before, during, and after the shooting. They did not express opinions on Mr. Diestel's sanity, but their observations could form part of the basis of the opinions of others, including the jury.

Helen Scott, whose house Mr. Diestel had approached when searching for the Casey residence, said that Mr. Diestel asked for directions to that residence and that she gave them to him. Mr. Diestel was "a clean-cut guy, nice-looking, well-dressed." Supp. R. Vol. II at 235. Nothing he said or did caused her any concern. He appeared to know where he was and the purpose of his visit.

Charles Wayne Canaday and Wesley Chaney, two employees at the golf course who encountered Mr. Diestel, recalled that Mr. Diestel was hard to understand and was slurring his words somewhat. Although nothing about Mr. Diestel's demeanor was of concern, Canaday recalled Mr. Diestel being "a little bit nervous." *Id.* at 242. Mr. Diestel appeared to know where he was, and he asked about nobody other than Casey.

Melony Velock, a golf-course employee who served Mr. Diestel in the golf course's restaurant, said that Mr. Diestel sat at the restaurant's bar. He ordered a beer. She chatted briefly with him, both observing that they were not from Oklahoma. But Velock said that Mr. Diestel "gave me the creeps [because m]ost people talk to me and are very social with me and he wasn't. He was very quiet and very—he wasn't very social." *Id.* at 255. Mr. Diestel then ordered a sandwich. While Mr. Diestel was still there, Casey entered the restaurant with another person. Velock's testimony continued as follows:

> Q: Now, with respect to Mr. Diestel, did he do anything that drew your attention when Mr. Casey came in?
>
> A: Somebody had said somebody was looking for Doug [Casey]. So I told Doug and I was teasing him about being a female and stuff. He said, you don't know who it is, and I said, no. Then he said, oh, and then I went back to the bar to ask the gentleman if he needed anything else and he was sitting at the bar with a newspaper facing over that direction and it was wide open.

> Q: From the appearance you indicated that Mr. Diestel had turned sideways and raised a paper up?
>
> A: Yes.
>
> Q: Did you believe that when he did so he was basically trying to secrete himself?
>
> A: I just thought it was weird that it was not sitting on the counter. Most people have it folded up and are reading it while they're sitting there and he had it wide open.
>
> Q: Was it of such a manner that, in fact—
>
> A: Nobody could have seen him.
>
> Q: Could he have even read the paper in the manner in which he was holding it?
>
> A: I don't know.

Id. at 256-57. When Casey left the restaurant, Mr. Diestel folded the newspaper and put it down. After that, he and Velock chatted some more, and he ordered a hamburger and another beer. On cross-examination Velock said that Mr. Diestel's positioning of the newspaper had not struck her as "weird until after the fact." *Id.* at 262.

Several golf-course employees testified about the shooting itself. Terry Gable was a greenskeeper. At 2:30 p.m. Gable, along with Curtis Ferrell and Casey, was getting ready to leave for the weekend. Ferrell stayed behind at the course, while Gable and Casey walked toward their cars in the golf course's parking lot. Mr. Diestel drove his truck, which had been parked at the lot, "up behind [Casey's car] so he couldn't move." *Id.* at 303. Mr. Diestel got out and walked up to Casey. He asked, "[A]re you Doug Casey?" and then "[D]o you remember me?" *Id.* at 305. "[A]bout a split-second" later Casey said, "[O]h shit," *id.* at 276, and began to run away. Mr. Diestel braced himself on his truck and fired three shots from what looked like a black handgun. When Casey continued running, Mr. Diestel pursued and fired a second series of shots. Then, according to Gable, Mr. Diestel

> basically just pulled his gun down like he was looking at it. He sort of just looks up at me–I'm directly right in front of him—like he just, I don't know, was checking his gun. I figured he emptied his clip or whatever. He just pulled his gun down after he gets through firing and just sort of glances up at me and then goes back to looking at his gun and basically just turns and starts slowly walking back to his truck.

Id. at 281. Gable observed that Mr. Diestel was fairly calm: "He just sort of [gave] me this little look. I'm right there in front of him and then just casually turns and starts heading toward his truck." *Id.* at 296. By this point Casey was out of Gable's sight. Gable drove away and parked his car on the path Mr. Diestel would need to use to leave the golf course, "hoping to get the tag number off the truck." *Id.* at 281. He was unable to obtain the license-plate number, but he saw Mr. Diestel "dr[i]ve by pretty calmly. He didn't speed or whatever." *Id.* Gable returned to the scene of the shooting to find Ferrell tending to Casey "in a pool of blood." *Id.* at 282.

John Rock, another greenskeeper, testified that he had seen Mr. Diestel driving his truck earlier. "Usually when you see somebody for the first time you can usually tell maybe what kind of mood they're in. He didn't look happy. It was almost like he was upset at me or something." *Id.* at 322.

The next several witnesses for the state were police officers and other government employees who responded to Mr. Diestel's shooting. Sergeant Remington was the officer who stopped Mr. Diestel after he was informed by radio dispatch that there had been a shooting at the golf course. When he saw Mr. Diestel's truck, he activated his emergency lights. "Before I ever pulled up and got stopped behind the vehicle a white male had exited the vehicle with his hands raised in the air. At that time I told the subject to lay down on the ground and he complied." *Id.* at 358. He then approached Mr. Diestel, handcuffed him, patted him down, and found a knife. The testimony continued as follows:

> Q: Did Mr. Diestel say anything at the time you approached him?
> A: Yes, sir, he did.
> Q: What was the first thing he said?
> A: After I handcuffed him he had stated the only reason he did it was because he raped a girl and set a bunch of fires in California.
> Q: Was that his total statement?
> A: Yes, sir.

Id. at 360. Remington then advised Mr. Diestel not to speak before being advised of his *Miranda* rights, but Mr. Diestel repeated that "the only reason I did it is because he raped a girl and set a bunch of fires in California." *Id.* A first responder then reported on Remington's police radio that Casey had stopped bleeding. Remington said that "[a]t this time, Mr.

Diestel then asked me, is he going to be okay?" *Id.* at 361. Mr. Diestel "seemed to be very calm" and "was not shaken up in any way." *Id.* He was compliant and obedient, and he responded as if he understood Remington's directions. Inside Mr. Diestel's vehicle Remington saw a black semiautomatic pistol, a Bible, and newspaper clippings apparently discussing forest fires in California.

Tony Damron of the Marshall County Sheriff's Office arrived at Mr. Diestel's vehicle a few seconds after Remington had pulled it over. Damron testified that Mr. Diestel was very calm and made no statements to the effect that he had "just apprehended a terrible person, I just shot Nero, go get Nero, [or] I've done you a great favor." *Id.* at 376. Damron described his interaction with Mr. Diestel as follows:

> I asked him why he's shot the guy out at the golf course and he stated that he had raped a girl and set some fires out in California. Then I asked him, I said, well, was it a girlfriend or what? And he said, yes. . . . I said, well, how did you meet him? He said that he had walked up to him and stated to him, "do you remember me?" And he said that's when the victim had [taken] off and started running and he started shooting at him. I asked him how far that he was when he started shooting at him, and he said, approximately 30 yards. He stated that the Sheriff in some county in California knew the victim and knew what kind of guy he was.

Id. at 377. Damron said that Mr. Diestel inquired about Casey's condition, asking, "[i]s he going to make it?" *Id.* The testimony continued:

> Q: Did Mr. Diestel ever indicate to you his intent whether or not he meant to kill [Casey], wound him, do anything like that?
> A: I had asked Mr. Diestel if he intended to kill him and he said, no, he intended to wound him. I said, you intended to wound him, and he said, yes, I intended to wound him. I didn't intend to kill him.
> Q: At the time that he was making these statements to you, . . . did Mr. Diestel tell you that he ever told Doug Casey, halt, you're under arrest, stop, don't move, anything like that?
> A: Mr. Diestel specifically stated to me that when he had first made contact with Mr. Casey he asked him, he said, "do you remember me?" And that's when Mr. Diestel stated to me that that's when Mr. Casey took off running.

Id. at 378. Damron added to the list of items in the car: one can of Body Guard, pepper spray, clothes and toiletries, a fanny pack, a 15-foot rope, a 40-foot chain, a chain lock, and several books: *Nero, The End of the Dynasty; I'm Your Jesus of Mercy; Nero, Reality and Legend;* and *The Answer, The Holy Bible.* On cross-examination Damron added that Mr. Diestel did not seem scared. On redirect he stated that Mr. Diestel's condition changed as he received more information:

Q: The information he received that became available to him about the condition of Doug Casey, did his demeanor change?

A: Yes, it did.

Q: How so?

A: He was starting to ask more of how he was doing and it was like that everything was sinking in on what he had done.

Id. at 391. In his view, Mr. Diestel's mounting concern was more for himself than for the victim.

Chris Cisco, a state park ranger, had been directed to go to the scene of the arrest to assist by taking custody of Mr. Diestel and some evidence. He described Mr. Diestel as coherent: "[H]e knew who I was and where he was . . . and understood what I was telling him." *Id.* at 397. He was also "very calm and very polite and very cooperative." *Id.* After taking Mr. Diestel to the county jail, Cisco had the chance to observe him. Mr. Diestel did not mention Nero, and he seemed to understand who he was, where he was, and the purpose for his being in jail.

David Seals, a Special Agent for the Oklahoma State Bureau of Investigation, interviewed Mr. Diestel. He testified that he was "very lucid, very clear-minded, deliberate in his actions, appropriately nervous." *Id.* at 407. He described various items taken from Mr. Diestel, including a list of phone numbers for golf pro shops and golf courses in the area. Like the other officers, he stated that Mr. Diestel did not mention Nero.

Carolyn Casey, the victim's mother, testified that she had met Mr. Diestel for the first time when he knocked on her door the day of the shooting. He asked about Doug Casey's whereabouts, and Ms. Casey asked why he wanted to know. He said he was "just an old friend passing through and wanted to look him up." *Id.* at 439. She described his behavior as follows:

> He was standing right at the door. He kept putting his hands either in his pockets or behind him. I don't remember exactly which it was. He kind of shuffled a little bit on the porch and he kept looking down. He wouldn't really look at me. He asked me then if Doug was at work and I told him I wasn't for sure, that it had been raining and I didn't know if he'd be at work or not. He said, at the golf course? I said, well, I don't know if he'd be on the course or in the maintenance area because the weather had been bad. Again, he asked me, he said, something about like—but he is at work, and I said, yes, in Durant.

Id. at 440. She asked again about his purpose, and he repeated his answer. But there was nothing alarming about his behavior. He mentioned only Casey, not Nero.

Ms. Casey testified that on reflection she had heard the name William James Diestel once before. The family had lived in Santa Paula, California, until Doug Casey was 20 or 21.

> When Doug was about 16 he had gotten into a fight. . . . He had been dating a girl and they'd

> been dating for over a year. Doug and I went to my grandmother's funeral in Missouri and were gone about a week or two. While we were gone she went out with this person a couple of times from what I understand. When we got back to California she told Doug about it and said that he was still bothering her and he wouldn't leave her alone. So Doug went to where he worked and confronted him.

Id. at 444-45. A fight ensued and the authorities got involved. The Caseys had the opportunity to press charges against Mr. Diestel but did not.

b. Defense Witnesses

The defense called four lay witnesses, only three of whom gave testimony relevant to the issues on appeal. It also introduced five depositions, but these are not in the record on appeal and do not figure in the parties' briefs, so we assume that they are not material to the issues before us.

John Atwood, Mr. Diestel's older stepbrother, testified that he had a good relationship with Mr. Diestel. He stated that his brother was "a very emotional person," Supp. R. Vol. III at 480, who reacted very strongly to his father's death from cancer in 1992 and began reporting visits from angels—apparently his father and two other deceased relatives. At first, Atwood testified, Mr. Diestel said that the angels told him to care for a child, but they eventually came to tell him to stop an evil demon who was raping women and setting wildfires. He referred to the demon as "this guy in Santa Paula," *id.* at 482, and spoke of the rape of a girl he had once dated. Atwood said that Mr. Diestel spoke of these voices "numerous times." *Id.* at 483.

Atwood repeatedly advised Mr. Diestel to seek professional help, but he was stubborn. He did, however, eventually get some treatment; he saw his ex-wife's father, a psychiatrist, who prescribed medication that appeared to help. He also saw another psychiatrist (a Dr. Templeton), but apparently only twice. During this time Mr. Diestel continued to work and was even promoted in his job.

After his divorce in the mid-1990s, Mr. Diestel became a heavy drinker. The drinking did not seem to affect his job performance, but over time the visions appeared to intensify, and he began speaking of them to family members other than Atwood. He also started to become more religious. He read the Bible and a book called *The Answer,* as well as books about Nero. He told Atwood of going to the authorities to report the causes of wildfires, rapes, and vandalism. From the summer of 2000 until the shooting in October, Mr. Diestel's condition seemed to worsen. Atwood said that

> he became more closed and seemed like he always was dwelling on something. He appeared to be always angry and he wasn't the happy person that I knew before that period. There was always periods of him seeming stressed, seeming angry and dwelling about something. I believe that was the Nero thing and the things that he was picking up from the books that he was reading.

Id. at 497.

That October there was a significant fire in Atwood's backyard caused by explosions of gasoline in the gardening shed. Atwood showed Mr. Diestel the fire; Mr. Diestel seemed disturbed about it, but he did not talk about it directly. A few days later he left for Oklahoma.

After Mr. Diestel was arrested in Oklahoma, he called Atwood to ask him to call the President of the United States, who would pardon him. He did not explain why he would be pardoned. "I told him, are you serious? Do you really believe you're going to get pardoned? He said, yeah, call the President and find out that I'll be pardoned." *Id.* at 494. He repeated this statement in later phone calls.

Other than the shooting of Casey, Atwood could recall no violence by Mr. Diestel. He had heard of the earlier fight with Casey, but Mr. Diestel had said only that someone had punched him in the face over a girlfriend.

In 1994 or 1995 Mr. Diestel began talking about capturing the "guy from Santa Paula [who] was raping and starting fires and vandalizing" and taking him to the police. *Id.* at 499. Atwood "knew that it wasn't a good idea for [Mr. Diestel] to have a gun," *id.*, so he asked him if he had one. He did, and Atwood took it from him. About eight months later Atwood returned the gun because Mr. Diestel seemed better and claimed that he wanted to sell it, but Mr. Diestel simply traded it for another gun. When Atwood found out about this, he took the second gun away.

Cross-examination elicited that Atwood had never reported to law-enforcement authorities Mr. Diestel's expressed intentions to stop the man who Mr. Diestel believed was setting fires, that Mr. Diestel sometimes was drunk when he reported his hallucinations, and that Mr. Diestel had not told Atwood that he had acquired a third gun, the one with which he killed Casey.

Suzanne Diestel, Mr. Diestel's younger sister, testified that she did not believe that he was a violent person. She said that he began seeing angels about the time of their father's death. As she described it, Mr. Diestel's discussions of his hallucinations and obsessions progressed—first from concern with vandalism and graffiti, next with concern about a break-in of his sister's home, then to "fires and Nero and angels." *Id.* at 523. From 1994 to 1999 they worked at the same restaurant; during that period she worked full-time and he worked part-time. Ms. Diestel never heard her brother talk about his visions to others at the restaurant. In 1998 she suggested that he seek help, which he did. His father-in-law, a psychiatrist, prescribed Prozac, as did a second psychiatrist, Dr. Templeton. During this time "he was very withdrawn, he was very . . out of it. I don't believe that he realized that he was crazy." *Id.* at 525.

According to Ms. Diestel, her brother quit taking medication and began drinking heavily at night in June 1999, continuing for about eight months, although it did not affect his work. (She insisted, however, that she had never known him to drink beer.) He then stopped drinking and smoking and started going to church. He also isolated himself from others, or at least from his sister. She recalled one occasion on which her husband took Mr. Diestel to target practice. Ms. Diestel said that Mr. Diestel once had a .22 pistol, which her husband and Atwood had taken from him.

After the shooting, Mr. Diestel made similar requests of his sister as he had of Atwood—that she should call the President, and that Mel Gibson and the author of *Embraced by the Light* knew of his mission. She said that Mr. Diestel believed in his mission: "He was not wrong in his mind, he was not wrong, and there was no disproving him whatsoever." *Id.* at 536.

On cross-examination the state elicited that Mr. Diestel's relatives continued to allow him to help take care of the children of another sister, despite their concerns about Mr. Diestel's psychological state, and that apparently Mr. Diestel could refrain from talking about his hallucinations when he chose to. Ms. Diestel agreed that she had never heard him talk of them to people at work.

The State also elicited that Ms. Diestel, like Atwood, did not report any of her concerns about Mr. Diestel to the authorities, although the family had arranged for another sister to be committed because of mental illness:

> Q: Well, ma'am, with respect to your prior history, would you describe your brother's situation as being more extreme and more concerning than that of your sister?
>
> A: Well, my sister was kind of on the same wave length, you know, talking to herself and talking to, you know, people. Like she

thought she was—it's different—my sister thought she was Cinderella.
Q: So nothing concerning the apprehension of anyone, nothing taking down a demon of anyone, right?
A: No.
Q: Your sister never killed anyone, did she?
A: No, sir.
Q: Yet, you have her committed three separate times?
A: Yes, sir.
Q: But your concern was so great for your brother that you don't do anything over eight and a half years to do the same thing for him, do you, not one thing?
A: Well, in California law it's very hard—
Q: Ma'am, you don't know the law. Did you ever do anything to see that your brother got committed in . . . eight and a half years . . . ?
A: Dr. Templeton obviously did not.
Q: Did you?
. . .
A: No.

Id. at 564-66.

Finally, Ann Diestel, Mr. Diestel's mother, testified. She corroborated the other witness's characterizations of the progression of Mr. Diestel's mental illness. On May 7, 1999, she composed a letter to Dr. Templeton detailing concerns about Mr. Diestel's mental health. But on cross-examination she admitted that the concerns—except for his alcoholism—came from other family members, not from her direct observations of Mr. Diestel. And, like the rest of Mr. Diestel's family, she did not report her concerns to the authorities, nor did she report ongoing concerns to Dr. Templeton or seek to have Mr. Diestel committed. Also, she admitted that she had talked to him about his delusions and hallucinations relating to fires, gangs, and rapes only twice between 1992 and October 2000, once within six months of the killing and once several years earlier.

2. Expert Testimony

Mr. Diestel called two expert witnesses, Drs. Terese A. Hall and John R. Smith, regarding his state of mind at the time of the shooting. The state presented Dr. John Arnold Call in rebuttal.

a. Dr. Hall

Dr. Hall, who had obtained a law degree and then a Ph.D. in clinical psychology, had a private practice in psychology and served part-time at Eastern State Hospital as a forensic psychologist. Because she had examined Mr. Diestel in her capacity as a state employee, she was not paid to testify.

She testified, based on interviews with Mr. Diestel and others and a review of Mr. Diestel's records, that Mr. Diestel was suffering from a severe mental illness, "[m]ost likely paranoid schizophrenia." Supp. R. Vol. IV at 14. Mr. Diestel told her during the examination that he had been charged with shooting someone; that "over the last 10 years . . . he had become convinced that this person was some kind of a demon named 'Nero' who had been setting fires and raping women and committing different acts of vandalism out in California." *Id.* at 13. He also said that he "had had visions of angels, and he believed just prior to this time he had a vision of Jesus himself directing him to go on a mission to cast down this demon, and that he traveled to Oklahoma for that purpose." *Id.* Mr. Diestel did not say precisely how he planned to "cast down" the demon, but he said that his goal was to "render him helpless," *id.* at 14, and that Jesus had instructed him *not* to kill Casey. He also said that he had been instructed to subdue Casey quickly "before President Clinton was out of office because President Clinton was going to pardon him." *Id.*

Dr. Hall told the jury that paranoid schizophrenia is

> a very serious mental illness, probably the most serious, one of the most serious in any event. It's characterized by being out of touch in reality in a variety of ways, most commonly through what we call "hallucinations," that means hearing things and seeing things that aren't really there, such as the voices he heard talking to him and the visions of angelic beings telling him things. It's also characterized most prominently by delusions, that means false beliefs about reality that seem very real to the sick person, such as his belief that there was a demon named "Nero" committing all these acts I saw those symptoms and those are the hallmarks of schizophrenia.

Id. at 15. She also stated that schizophrenia is a chronic, often lifelong illness; it is treated with medication, which is often but not always successful.

Dr. Hall further testified that there was no indication that Mr. Diestel was "malingering." *Id.* at 16. When asked whether "the person suffering from this illness [is] able to distinguish right from wrong," *id.*, Dr. Hall replied, "In areas in which the thinking is delusional and not based in reality their perceptions of right and wrong can be affected as well," *id.* at 17. Pressed for a yes-or-no answer, Dr. Hall said, "I guess it would be it depends. It wouldn't be a blanket across the board." *Id.* Asked if paranoid schizophrenia equated to "insanity" in a legal sense, Dr. Hall said, "You can't equate the two. You have to ask what effect the illness had at that particular time on that particular action." *Id.* at 18. But when asked whether she had "any reason to believe that on [the date of the murder] Diestel was not insane,"*id.* at 19, she answered, "No, I don't." And she stated that someone who is "capable of making plans," who "understands instructions given to him," who is "very calm" and "quite coherent," and who has a "total recall later of what occurred," could "still be capable of suffering from paranoid schizophrenia." *Id.* at 20.

On cross-examination Dr. Hall said that she spent "less than three hours total" with Mr. Diestel, *id.* at 21, and she admitted that she had never made a determination of Mr. Diestel's sanity at the time of the killing. Cross-examination also established that most of her information on Mr. Diestel ultimately came from Mr. Diestel himself. And she agreed with the state that paranoid schizophrenia does not "in and of itself lend [sic] one to be insane." *Id.* at 25. Instead, such a determination "would depend upon the individual facts of the case" and "upon that person's actions, their words, their deeds, observations of others at or near the time when the real question of insanity comes in." *Id.*

b. Dr. Smith

The second defense expert, Dr. Smith, was a medical doctor specializing in psychiatry. He had served as an associate professor of psychiatry at the University of Oklahoma School of Medicine before entering private practice in 1970, while maintaining teaching positions at the medical school and the University of Oklahoma School of Law. He received a $2,000 fee from the defense to review Mr. Diestel's records and to evaluate him, and an additional $1,500 to testify.

Dr. Smith interviewed Mr. Diestel for approximately three hours as part of a "comprehensive psychiatric evaluation." Supp. R. Vol. V at 6-7. In reaching a diagnosis of paranoid schizophrenia, which he called "pretty obvious," *id.* at 8, he also spoke with Mr. Diestel's mother by phone, reviewed a letter that she had written to a psychiatrist before the killing "describing her deep concern in the presence of clear delusional thinking," *id.*, and looked at "many other sources of information," *id.* Dr. Smith said that Mr. Diestel's account to him of the shooting was consistent with what "he's described in his police report." *Id.* at 9. He elaborated:

> [H]e had come to believe delusionally that Mr. Casey . . . had, in fact, become the spirit embodiment of Nero. He had been accumulating information for several years about fires in California, reading messages from graffiti and

> believing increasingly that Mr. Casey was the spirit of Nero and that he had to be captured and in some way brought down. It's not totally clear what he delusionally believed that consisted of, but it seemed to consist of some sort of exorcism or some sort of ridding him of demons. He believed that if this was not done that Nero and the body of Mr. Casey would bring some extreme destructiveness to the world and to him and to his family.

Id. Paranoid schizophrenia, Dr. Smith said, often involves delusions "focus[ ]ed around certain specific issues." *Id.* Mr. Diestel's delusions had "evolved over a long period of time" and had gotten "much worse in more recent times." *Id.* at 10. This, too, Dr. Smith added, is consistent with paranoid schizophrenia, which "is a chronic disease that tends to evolve over a period of time" and typically comes "later in life." *Id.*

Dr. Smith said that Mr. Diestel also suffered from hallucinations in which he heard supernatural beings telling him that Casey was evil and a danger to the world. Mr. Diestel had "always indicated he did not intend to kill" Casey, but instead "strike him down, whatever that means." *Id.* at 26. Dr. Smith also testified that Mr. Diestel's ability to structure plans and to recall the events leading up to the killing were "not only consistent, but . . . ordinary" for a person suffering from paranoid schizophrenia. *Id.* at 14. The disease "does not interfere with organizational and cognitional abilities." *Id.* Indeed, many people with the disease often appear normal, he said, and can plan activities, hold a job, and so forth.

When asked whether Mr. Diestel "knew right from wrong" when he shot Casey, Dr. Smith replied as follows:

> Within the context—if you put yourself inside of Mr. Diestel's head, believing that you are saving the world and saving your family because an evil spirit has inhabited someone and that you have been dictated to exorci[z]e that evil spirit, then you can understand that he believed he was doing the right thing and did not have an ordinary man's concept of right and wrong in relationship, specifically, to Mr. Casey. So at that moment in time he could not distinguish because of a severe mental illness between right and wrong. He believed he was doing the right thing in relationship to the world and in relationship to his religious beliefs.

Id. at 16-17.

Asked whether there was "any possibility" that Mr. Diestel was malingering, Dr. Smith replied:

> He was not malingering. There are many issues that would confirm that. The best test of malingering is having an expert who knows the course of the illness, who knows rather what the patient is demonstrating in the interview, rather what the history has shown, what cor[oll]ary information that you have available shows, confirms your diagnosis. In this case he was very straightforward, very honest. He told me what he believed. He was in much better shape when he told me. He was beginning to

> doubt the delusions and beginning to doubt whether they were really true or not and he was no longer having hallucinations when I saw him. There is no question that he is not malingering.

Id. at 22.

On cross-examination Dr. Smith volunteered that he was "not a forensic psychiatrist in the sense of being Board Certified in forensic psychiatry." *Id.* at 28. He explained the difference between a forensic psychiatrist and a treating psychiatrist who provides therapy: "With an individual patient psychotherapy it's an on-going relationship usually. . . . You are certainly not as alert to issues like malingering, deception, things of that sort, which you're very aware of in a legal evaluation." *Id.* at 31. In contrast, "as a forensic psychiatrist you spend relatively short periods of time with a person and your focus is different. You want to establish competency, you want to establish the presence or absence of mental illness, things of that sort." *Id.* He acknowledged that it would ordinarily be unethical to be both the treating psychiatrist and the forensic psychiatrist for the same person.

The state questioned Dr. Smith about the information on which his opinion rested. Dr. Smith said that there was no need for him to interview Mr. Diestel more than once because "everything he had told me was perfectly consistent with all of the other reports that I read." *Id.* at 34. He also testified that what Mr. Diestel's mother had told him was based on "her direct observations of him over time in addition to things that he has told her." *Id.* at 35. The state then informed him that she had actually gotten her information from other people and asked:

> Q: So if it's important to your conclusions that she observed the information that's in the letter and she didn't actually observe that, you may have to re-think your conclusions, won't you?

Id. at 36. He responded:

> A: No, I won't for several reasons. One, is because what she described there is perfectly consistent with everything else I know about him. Also, her source of information about what was going on with him has been confirmed by other people who knew him, including his ex-wife. If that's where she got the information it's confirmed by her and it is so consistent, in fact, with the information that's been supplied by everyone else that she had correct information wherever she got it.

Id. When the state suggested that Mr. Diestel was really the source of all the information about his illness, Dr. Smith responded:

> It comes from Bill Diestel and other people who observed him and it comes from observable information in the terms of collecting things about the fires, which fits with his delusions, from looking at the books he was carrying, which fits with his delusions, so that when you

> put it all together it's absolutely confirmatory of what he said.

Id. at 38. Dr. Smith admitted, however, that he could not determine with certainty whether Mr. Diestel had been hallucinating, because "he was not hallucinating at the time I saw him and he told me he was not." *Id.* at 64.

In the same vein, the state questioned Dr. Smith about the last paragraph of his five-page written report. It stated:

> There is still a good deal of information which I have not reviewed. This is a preliminary report. Any additional information I develop from reading numerous interviews will be included at a later date. I feel quite confident in my conclusions at this time and expect that the additional information will be confirmatory.

Id. at 56 (internal quotation marks omitted). Dr. Smith testified that the only new information he received that was "anything but just confirmatory" of his report, *id.* at 55, was that police interviews with Mr. Diestel had elicited that he had owned a gun before purchasing the one used to shoot Casey (whereas the report, which is not in the record, evidently indicated that he had not previously owned a gun). Accordingly, Dr. Smith said, he "didn't add any or submit any additional reports because it was all so confirmatory of what I already knew and had already reported that I simply didn't do anymore [sic] reporting." *Id.* at 56.

The state elicited, however, that the report contradicted the trial evidence in three other respects. First, the report stated, contrary to the eyewitness testimony, "At the time of the arrest it was obvious that [Mr. Diestel] was severely disturbed." *Id.* at 68 (internal quotation marks omitted). Second, the report said, again contrary to eyewitness testimony, that Mr. Diestel had not drunk alcohol for several months before the shooting. Third, Dr. Smith acknowledged that the testimony that a member of Mr. Diestel's family had taken him to a shooting range was contrary to his assumptions. Dr. Smith further acknowledged that although the police reports mentioned the books about Nero found in Mr. Diestel's car, there was no indication that Mr. Diestel had referred to Nero from the time he left California until the time Dr. Smith interviewed him on January 31, 2001, more than three months after the killing.

The state also questioned Dr. Smith about his conclusion that Mr. Diestel suffered from paranoid schizophrenia. It examined the meaning of this diagnosis:

> Q: Now, is it your opinion, Doctor, that at the time Bill Diestel shot Doug Casey that Bill Diestel knew that he was Bill Diestel?
> A: Yes, he knew he was Bill Diestel.
> Q: Did he know that Doug Casey was Doug Casey?
> A: He did not know—he knew he was the body of Doug Casey, but he thought he was shooting the spirit of Nero.
> Q: But he knew he was shooting a body that he identified as Doug Casey?

A: Yes. Otherwise, he couldn't have found him on the internet. . . .
Q: That at that time he knew he was shooting a handgun?
A: Yes, he told me he had a gun in his hand.
Q: He didn't think he was working the video clicker and he was just going to turn Doug Casey's volume down?
A: No.
Q: Nothing like that?
A: No.
Q: He knew it was a handgun?
A: He knew it was a gun.
Q: And he knew that handguns shoot bullets out of them?
A: He obviously did because he shot at him with the intention of crippling him.
Q: He told you he intended to shoot him?
A: Nero.
Q: And he knew that when bullets strike a human being they cause damage?
A: I didn't ask him that specifically, but he knew he could cripple him.
Q: You didn't ask that. He knew that Doug Casey was a human being?
A: Yes, he knew—well, he thought he was the spirit of Nero. He knew the body was Doug Casey.
Q: But if he wanted to exorci[z]e this demon that inhabited Doug Casey—
A: He had to capture Doug Casey.
Q: The only way a spirit could inhabit a body is if it's a human body?
A: I assume so.

Q: He didn't tell you that Doug Casey was, in fact, Nero?

A: He told Dr. Hall something along that line.

Q: But he didn't tell you that?

A: He told me that he felt that Nero—that Doug Casey was Nero, that he had to capture him and in some way talk him out of it.

Q: Let's put it down to this, he didn't believe in his mind that Doug Casey was a rabid 200-pound wolf who was attacking him and he had to protect himself, nothing like that?

A: No, no, he did not.

Q: He knew—

A: I guess he thought he was a beast, but he was running away from him and not toward him.

Id. at 61-63.

On redirect examination Dr. Smith said that there was nothing inconsistent between Mr. Diestel's not having proclaimed after the shooting that he had just killed Nero and Mr. Diestel's believing that he had done so. Also, he repeated that at the time of the shooting Mr. Diestel "thought he was right" and could not distinguish right from wrong. *Id.* at 73.

c. Dr. Call

The state's expert, Dr. Call, was the only board-certified forensic psychologist in Oklahoma. He had a Ph.D. in clinical psychology and a law degree. He was paid $150 an hour by the state to evaluate Mr. Diestel and to testify.

Dr. Call reviewed records and interviewed Mr. Diestel, seven law-enforcement officers, and an eyewitness to the shooting. He testified that

> [i]t is crucial that a Forensic Psychologist in performing an evaluation of an individual's mental state at the time of a crime to interview individuals who saw the individual at the time of the crime, shortly before or after and/or during, if at all possible, so that one can utilize that data and that information to make a determination as best one can what their mental state was.

Supp. R. Vol. VI at 6-7. Dr. Call stated that even if one suffers from delusions—that is, false beliefs—he might still know whether something is wrong. Moreover:

> Q: In order to make a determination of whether someone was suffering from a delusion of mistaken belief or anything like that, it is important that we look at the individual facts present at or near the time the act of which we're complaining of occurred?
>
> A: Yes.

Id. at 8.

Dr. Call observed that Mr. Diestel made no statements to suggest that he was operating under color of law; for instance, his thinking was different from those who "delusionally think that an individual needs to be killed and they believe that they have a warrant for that." *Id.* Rather, he said, Mr. Diestel made statements to him that would "indicate that he knew, understood and appreciated what he did out there that day." *Id.* at 9. In particular, "he indicated that—in our conversations that he knew he was shooting a human being who was a citizen of the United States and he knew that he was operating a handgun and that he knew that he had, in fact, shot the victim." *Id.*

Similarly, Dr. Call testified that Mr. Diestel's inquiries about Casey's condition and his statement that he did not intend to kill him indicated that Mr. Diestel "understood and appreciated" the act. *Id.* at 10. Furthermore, "[h]e indicated to me that he knew that Doug Casey was the person that he was shooting." *Id.* The testimony continued as follows:

> Q: During the course of your interview and evaluation, was he clear in his understanding that not only was he shooting Doug Casey but that Doug Casey had certain rights and privileges?
>
> A: Yes. He indicated that he had the realization that, you know, Doug Casey was a human being and a citizen. He also felt that, like I say, I explored this with him and he also believed that Doug Casey was the reincarnation of a Roman emperor. I was interested in this in particular. It's not that he felt that there was a spirit of a Roman emperor inside of Doug Casey, but that Doug Casey was a human being who just happened to also be the reincarnation of Nero.

Id.

Dr. Call agreed that Mr. Diestel "might have been suffering from paranoid schizophrenia" when he killed Casey, but that it is "possible for someone suffering from a psychos[i]s such as paranoid schizophrenia to do an act, in this case a criminal act, and know that it was wrong." *Id.* at 11.

On cross-examination Dr. Call stated that he had spent two to three hours with Mr. Diestel. His evaluation report had concluded that "the bulk of the data indicates that on the day of the homicide Mr. Diestel could be diagnosed as suffering from paranoid schizophrenia." *Id.* at 15 (quoting report). The testimony continued:

> Q: If the delusions and hallucinations were directing [Mr. Diestel] . . . on the day that he committed this crime, would he then have been able to discern or differentiate between right and wrong on that day?
>
> A: The answer to that question is yes possibly and no possibly. It is possible for an individual to have a command hallucination or command delusion and to not know if it's—
>
> . . .
>
> Q: Would you explain that for the jury? Does that mean that they're commanded to do a certain thing?
>
> A: For example, a situation like a command hallucination, let's say, you hallucinate a figure, a person or object, and that figure tells you to do something, like kill this person.

Q: Or to strike down this person or whatever the terminology might be, right, to cast him down?

A: To cast him down, whatever, but they're commanding you to do something. Now, on the one hand it is possible that the individual could know that doing that is wrong. I've had cases where that's true. It's also where they might not believe that it's wrong. . . .

If they have a command hallucination they're being directed, but they could know on the one hand that the direction is wrong and that the action is wrong and against the law. On the other hand, in a certain circumstance they might know and they might come to the conclusion that, no, it's not wrong. If I do this this is the right thing to do. For example, if they're doing it under the color of law. Like maybe they have a command hallucination of a President saying, here's a warrant, go out and kill this person, execute them because you have a warrant from the President of the United States to do so.

Q: Or that someone was the reincarnation of Nero, the Devil, and he was being directed to go and strike this evil person down, wouldn't that be one example?

A: No. It could be, but then it might not be. It depends on what the individual actually thinks when they're doing that. The best way since we can't read minds, the way we figure that out is how they actually commit

> the crime, what they do beforehand, during and after.

Id. at 20-22. Dr. Call also admitted that Mr. Diestel told him of delusions and hallucinations and that such reports were "consistent with other information that he believed that he had this delusion that the individual and the victim was Nero and a bad person and that he needed to do something to this fellow." *Id.* at 30. But he declined to state an opinion on whether Mr. Diestel was legally sane or not:

> Q: Now, I'm going to ask you [about] your final determination about Mr. Diestel's mental state on the day he . . . shot and killed Mr. Casey, and ask you, if . . . you don't conclude that he was able to discern or differentiate between right and wrong, do you?
>
> A: No. That's the ultimate legal issue, also known as the "verdict," which a jury decides and not a psychologist or psychiatrist.
>
> Q: But you don't say anything about whether he knew or could have known that what he was doing was not right?
>
> A: Well, if I understand you correctly, he knew that Mr. Casey did not want to be shot, he knew that he was shooting Mr. Casey, he knew that Mr. Casey was a flesh and blood human being, an American citizen. . . . That he also believed that Mr. Diestel was an evil man, the Roman Emperor Nero reincarnated, a man who raped a woman and who set fires in California. . . . It also indicates that Mr. Diestel was obsessed with the victim and carried a grudge against Mr.

> Casey in part because he assaulted him years earlier. And the bulk of the data indicates that on the date of the homicide Mr. Diestel could be diagnosed as suffering from paranoid schizophrenia.
>
> Q: So you expressed no opinion whether Mr. Diestel knew the difference between right and wrong on the day that he committed this crime?
>
> A: That's correct. I don't have an opinion because that's the verdict.

Id. at 31-32.

On redirect examination Dr. Call clarified the distinction between a medical diagnosis and a legal conclusion: "paranoid schizophrenia and insanity [are] two different issues." *Id.* at 34. A finding of paranoid schizophrenia, he emphasized, does not determine the ultimate legal question of whether Mr. Diestel could distinguish right from wrong. He added that revenge is a common "primary" motive for homicide and that Mr. Diestel "made comments about Casey which indicates to me that he was vengeful." *Id.* And he declined to conclude that Mr. Diestel was "compelled" to kill Casey, *id.* at 35, distinguishing hallucinations and delusions from such compulsions. He further stated that "in my experience, if an individual with paranoid schizophrenia kills somebody and believes that they have done a good thing they will say that." *Id.* He saw no evidence that Mr. Diestel had sought praise. He reiterated that it is possible for a sufferer of paranoid schizophrenia to commit an act and still know that it is wrong.

C. State-Court Appeal

Mr. Diestel was convicted at trial and appealed to the OCCA on May 16, 2002. It affirmed the conviction in an unpublished opinion, with one judge dissenting. The court held that the state had presented substantial evidence that the killing had been for revenge. It recognized that "[t]he experts in this case were consistent in their diagnosis that [Mr. Diestel] suffered from paranoid schizophrenia." OCCA Op. at 10. (Citations to the OCCA opinion, Aplee. App. at 42-56, will refer to the page numbers of the opinion rather than those of the appendix.) "However," it added, "evidence of a mental disability alone is not sufficient to establish insanity at the time of the offense. Testimony in this case established that paranoid schizophrenia cannot be equated with insanity." OCCA Op. at 10 (citation omitted).

In particular, the court characterized Dr. Call's testimony as stating that Mr. Diestel's illness "did not preclude him from knowing that shooting the victim was wrong" and that "the best way to determine whether a person was sane, as in he was aware that the commission of an act was wrong, was to look at what the person did before, during, and after the crime." *Id.* at 7. It observed that when the police apprehended Mr. Diestel, "he never mentioned Nero or made any reference to his delusions," and it noted Dr. Call's testimony that if Mr. Diestel "had truly believed he had done a good thing by shooting the victim, he would have said so." *Id.* The court concluded:

> The issue [is] whether [Mr. Diestel's] mental disability so impaired his judgment that, at the

time he killed the victim, he was incapable of appreciating the nature and consequences of his acts or knowing right from wrong. A review of [his] actions, prior to, during, and after the crime, shows that he knew right from wrong and was sane at the time of the crime. [He] apparently only told family members about his delusions and hallucinations. Co-workers in California had never heard those claims, and in fact testified that [he] was a good employee with nothing in his demeanor to indicate he was having any mental problems. [He] left California specifically to travel to Oklahoma and find the victim. He obtained a list of golf courses in order to determine where the victim worked. [He] purposefully deceived the victim's mother in order to locate the victim.

After the shooting, [Mr. Diestel] claimed he intended only to capture the victim and take him prisoner. If that were truly [his] intent, he did not take advantage of the numerous opportunities to do so-in the restaurant, in the parking lot. However, instead of taking him prisoner, [he] shot the victim-not in the legs or the butt as he claimed was his intent, but in the back of the neck as the victim was running away. These actions support an inference that they were committed with the intent to kill the victim.

Again, after the shooting, there was no attempt to take the victim prisoner as he had collapsed behind the maintenance building out of [Mr. Diestel's] view. [Mr. Diestel] merely left the scene, and did so in a calm manner. When it became apparent that the authorities were on to

> him, [he] pulled his pickup over and exited it before the officer could even get his car stopped. Testimony from the arresting officers established that [he] admitted shooting the victim and seemed to have no trouble understanding what was occurring. This behavior illustrates that [he] was aware that his shooting of the victim was wrong.
>
> Further, [his] stories about Nero and the evil demon did not surface until sometime after the crime when he was interviewed by the medical experts. [He] never said anything about the evil demon to the arresting officers. [His] attempts to create an excuse that he merely intended to capture the victim and not kill him supports an inference that he understood that his actions were wrong.
>
> After a thorough review of the evidence presented by both parties, we find [Mr. Diestel] did not meet his burden of raising a reasonable doubt as to his sanity at the time of the crime. The evidence clearly supports the jury's determination that [he] was sane beyond a reasonable doubt at the time he killed the victim.

Id. at 10-12.

The OCCA also rejected Mr. Diestel's argument that the jury should have been instructed on the consequences of a not-guilty-by-reason-of-insanity verdict, holding that Oklahoma law did not require such an instruction.

II. SUFFICIENCY OF THE EVIDENCE

Evidence of guilt is sufficient if "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Dockins v. Hines,* 374 F.3d 935, 939 (10th Cir. 2004) (quoting *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). But the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) "adds an additional degree of deference to state courts' resolution of sufficiency of the evidence questions." *Patton v. Mullin,* 425 F.3d 788, 796 (10th Cir. 2005). AEDPA provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Because "[s]ufficiency of the evidence is a mixed question of law and fact[, w]e ask whether the facts are correct and whether the law was properly applied to the facts, which is why we apply both 28 U.S.C. § 2254(d)(1) and (d)(2) when reviewing

sufficiency of the evidence on habeas." *Maynard v. Boone,* 468 F.3d 665, 673 (10th Cir. 2006). "[T]he question before us is whether the OCCA's conclusion that the evidence was sufficient constituted an unreasonable application of the *Jackson* standard." *Patton,* 425 F.3d at 796.

Whether the evidence is sufficient depends, of course, on what the state is required to prove. *See Jackson,* 443 U.S. at 324 n. 16, 99 S.Ct. 2781 ("[T]he standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law. Whether the State could constitutionally make the conduct at issue criminal at all is, of course, a distinct question."). Under Oklahoma law the defendant bears "the burden of raising a reasonable doubt of his sanity at the time of the crime." OCCA Op. at 4 (internal quotation marks omitted). If that burden is met, "it is incumbent upon the State to prove beyond a reasonable doubt that the defendant could distinguish between right and wrong at the time of the offense." *Id.* at 4-5 (internal quotation marks omitted).

The final paragraph of the OCCA's analysis of the sufficiency of the evidence in this case is somewhat troubling. The court wrote:

> After a thorough review of the evidence presented by both parties, we find [Mr. Diestel] did not meet his burden of raising a reasonable doubt as to his sanity at the time of the crime. The evidence clearly supports the jury's determination that [he] was sane beyond a reasonable doubt at the time he killed the victim.

Id. at 12. We do not agree with the first sentence insofar as it could be read to say that Mr. Diestel failed to satisfy his burden of presenting sufficient evidence for a reasonable juror to harbor a reasonable doubt. But even if the statement in that sentence is incorrect,[1] the next sentence—that the evidence supports a finding of sanity beyond a reasonable doubt—correctly addresses the dispositive issue (the sufficiency of the state's evidence). Therefore, we must grant AEDPA deference to the OCCA's ruling in that sentence.

The thrust of Mr. Diestel's insufficient-evidence argument is that a defense expert, Dr. Smith, unequivocally testified that Mr. Diestel could not distinguish right from wrong when he killed Casey and that no other evidence at trial could dissipate the reasonable doubt created by that testimony. To evaluate this argument, we must examine the role of expert opinions regarding insanity in criminal trials.

The general rule is that juries are not bound to believe opinions of witnesses, even if they are qualified as experts. *See United States v. Oliver*, 278 F.3d 1035, 1043 (10th Cir. 2001) ("[I]t is solely within the province of the jury, to weigh . . . expert testimony." (internal quotation marks omitted)); Tenth Circuit Pattern Criminal Jury Instructions § 1.17 (2005) ("A witness who has knowledge, skill, experience, training or education, may testify and state an opinion concerning such matters. You are not required to accept such an opinion. You should consider opinion testimony just as you consider other testimony in this trial."); Oklahoma Uniform Jury Instructions-Criminal § 9-42 ("Testimony has been introduced of certain witnesses who purport to be skilled in their line of endeavor or who possess peculiar knowledge. . . . You may consider the testimony of these witnesses, and give it such weight and value as you think it should have, but the weight and value to be given their testimony is for you to determine."). Indeed, a jury instruction appears to have advised the jurors in this case that they need not believe experts; in final argument the state said to the jury: "While we're on the subject of doctors, remember Instruction 3. You don't have to just accept what they say just because they've got credentials. You don't check your common sense at the door." Supp. R. Vol. VII at 630-31. (Instruction 3 is not in the record.)

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[1] Perhaps the OCCA meant to say only that the evidence did not persuade the jury to have a reasonable doubt; but we need not resolve that matter.

This general rule applies to psychiatric testimony. Under Oklahoma law, "[a] jury can disregard entirely the testimony of psychiatric or medical experts and find sanity from testimony of lay witnesses alone." *McGregor v. State,* 885 P.2d 1366, 1376 (Okla. Crim. App. 1994). Our own cases have repeatedly held that juries need not be swayed by expert psychiatric testimony, regardless of disparities in the number or thoroughness of experts on either side of a case. For example, in *United States v. Madrid,* 673 F.2d 1114 (10th Cir. 1982), we affirmed a conviction for robbery even though "four of the five experts who expressed opinions on the issue of sanity concluded that [the defendant] was not capable of conforming his conduct to the requirements of the law at the time of the robbery" and "defense experts examined defendant numerous times over different periods of several months," whereas the state's expert did not examine the defendant "until he had been institutionalized and treated for about one year after the robbery, and his second examination was over 13 months after the offense," *Id.* at 1123. We held that "the jury could justifiably have found beyond a reasonable doubt that Madrid was competent at the time of the robbery," *id.*, based on the testimony of eyewitnesses to the crime, another lay witness who observed him planning the crime, and a state expert who did not believe that the defendant was schizophrenic.[2]

Similarly, in *United States v. Walker,* 524 F.2d 1125 (10th Cir. 1975), the defense expert had spent more than five hours with the defendant and heard all the evidence at trial, whereas the state's expert had spent only an hour with the defendant and did not hear other testimony at trial. Yet we rejected the defendant's argument that "more weight should be given to [the defense expert's] testimony because he studied [the defendant's] mental condition in greater depth." *Id.* at 1128-29. We explained that "the credibility and weight to be given the testimony is not a question for an appellate court; that is for the trier of fact." *Id.* at 1129.

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[2] Before 1984, "if a federal defendant introduced sufficient evidence to raise a reasonable doubt as to his sanity, it was sufficient to create a question for the jury on which the Government bore the ultimate burden of persuasion beyond a reasonable doubt." *Dixon v. United States,* --- U.S. ----, 126 S.Ct. 2437, 2444, 165 L.Ed.2d 299 (2006). In 1984, however, Congress changed this burden, "requiring a defendant to prove his insanity by clear and convincing evidence, 98 Stat. 2057, codified at 18 U.S.C. § 17(b)." *Id.* at 2445.

And in *United States v. Coleman*, 501 F.2d 342 (10th Cir. 1974), we upheld a conviction of air piracy even though the only expert witness to testify regarding sanity was for the defense. We said, "The credibility and weight of expert testimony are matters within the jury's province and need not be accepted as conclusive even though uncontradicted by counter-medical expertise." *Id.* at 346; *see also Valdez v. Ward,* 219 F.3d 1222, 1238 (10th Cir. 2000) ("Despite the relative strengths of the expert testimony, only the fact-finder may determine whether the defendant was legally sane.").

Moreover, we should not overemphasize that one expert, as opposed to the others, expressed an opinion on the ultimate issue of sanity. Indeed, in federal court the rules of evidence preclude an expert witness from offering an opinion that a defendant could or could not distinguish the difference between right and wrong. Fed R. Evid. 704(b) states:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto. Such ultimate issues are matters for the trier of fact alone.

As we have noted:

> The rule prevents a confusing "battle of the experts" and preserves the decision on the ultimate issue of state of mind for the jury, rather than leaving it in the hands of retained experts. The rule promotes reliability by preventing testimony on the legal connotations of a medical diagnosis, a role the American Psychiatric Association admits that psychiatrists are not qualified to fill.

United States v. Austin, 981 F.2d 1163, 1166 (10th Cir. 1992); *see also United States v. Wood,* 207 F.3d 1222, 1236 (10th Cir. 2000) (Rule 704(b) is intended to prevent "intrusion[s] into the province of the jury"). Another court has similarly written:

> The at least theoretical effect of Rule 704(b) is to make it possible for juries to find a defendant not guilty by reason of insanity even if no expert would draw that same conclusion. Conversely, the rule also permits juries to find a defendant sane and guilty even if every expert would opine that the defendant was insane. The purpose of Rule 704(b) is to have jurors decide whether the defendant was sane or not without being told what conclusion an expert might draw.

United States v. West, 962 F.2d 1243, 1247 (7th Cir. 1992). Rule 704(b) did not, of course, apply in Mr. Diestel's state-court trial. But when assessing the reasonableness of the verdict, it is worth noting that the evidence on which Mr. Diestel most relies would not even have been admissible in a federal trial.

Turning to this case, there was considerable testimony from which the jury could reject Dr. Smith's opinion and find that Mr. Diestel knew the difference between right and wrong at the time of the killing. First, although all three experts agreed that Mr. Diestel had paranoid schizophrenia, the jury had reason to doubt the severity of the disorder. Mr. Diestel's mother, who expressed grave concern about her son, said he spoke to her of his delusions relating to wildfires, gangs, and rapes only twice during an eight-year period. Mr. Diestel apparently never spoke of these stories outside his family. And, most tellingly, the sister and stepbrother to whom he allegedly spoke about these matters most frequently never sought to commit him even though they had committed his sister three times.

The jury also could have questioned Dr. Smith's testimony. He was not, like the state's expert, board certified for forensic work. And the jury could have viewed him as pursuing an agenda because of his unwillingness to adjust his conclusions in light of evidence contrary to his original understanding of the facts—such as Mr. Diestel's gun ownership, his use of alcohol, and his demeanor on the day of the killing.

In addition, Dr. Smith's expert testimony did not stand unqualified or uncontradicted by other experts. Dr. Hall, the other witness for Mr. Diestel, testified that those who suffer from paranoid schizophrenia may still be able to tell right from wrong and may be legally sane. Dr. Call, the only board-certified forensic psychologist in Oklahoma, said the same. Dr. Call further testified that if Mr. Diestel had thought that he had done the right thing, he would have said so, but those who arrested him testified that he did not brag or seek praise for his actions. To be sure, Dr. Call never said that Mr. Diestel was sane, stating instead that it would be inappropriate for him to offer his opinion on the issue. But the jury could have been persuaded by Dr. Call's respect for his limited role and the suggestion that Dr. Smith had been unprofessional.

Furthermore, the events on the day Casey was killed, as reported by lay witnesses, could be seen as inconsistent with Mr. Diestel's defense. *See Madrid,* 673 F.2d at 1123 (expert's testimony, coupled with that of lay witnesses who observed the defendant at the scene of the robbery and "planning the robbery in advance," was sufficient for a jury to find guilt beyond a reasonable doubt). Eyewitnesses testified that Mr. Diestel seemed calm and deliberate. (The experts testified that Mr. Diestel's schizophrenia did not necessarily prevent him from implementing complex plans, but the jury was entitled to draw its own conclusions from Mr. Diestel's behavior.) More importantly, Mr. Diestel's actions appear inconsistent with his alleged plan to stop a demon. He had an opportunity to capture or confront Casey before he shot him in the parking lot, yet he took no action. When he finally approached Casey, he said nothing of Nero; instead, he said "[D]o you remember me?" Supp. R. Vol. II at 303. He shot Casey in the neck, not in the legs. After the shooting he still failed to apprehend Casey; he just drove away. And when he was arrested, he said nothing of Nero or demons. Apparently there was no testimony or other evidence of his speaking of Nero from the time he left California until his interview with Dr. Smith three months later.

We emphasize that the lay witnesses were not testifying to their opinions of Mr. Diestel's sanity, but were providing observations from which others (the experts and the jury) could draw inferences. To be sure, lay witnesses *alone* may be insufficient in some cases to rebut a particularly strong insanity defense. *See McKenzie v. United States,* 266 F.2d 524, 525-26 (10th Cir. 1959) (lay witnesses' observations of defendants' behavior, before and after the crime, were insufficient to rebut a defense that marshaled seven physicians and psychologists and "Selective Service records . . . which showed that the defendant had been rejected for military service . . . because of paranoid psychosis, and other reasons"). But the general rule is that lay testimony can suffice. *See, e.g., Coleman,* 501 F.2d 342. Moreover, the state did not rely on lay witnesses alone. It called Dr. Call to give expert guidance to the jury; and both he and Dr. Hall (a defense witness) testified that a determination regarding sanity would depend on the defendant's words and behavior at the time of the offense. We note that the state may satisfy its burden merely by undermining the defense's evidence. *See United States v. McGraw,* 515 F.2d 758, 760 (9th Cir. 1975) ("Once the defendant has introduced sufficient expert testimony to support a reasonable doubt as to sanity, the government must: (1) introduce its own expert testimony in rebuttal; *or* (2) discredit the defendant's expert testimony on cross-examination; *or* (3) rely upon evidence from which the jury may infer that the defendant's expert testimony depends upon an incorrect view of the facts." (emphasis added)).

On appeal Mr. Diestel relies principally on *Kiser v. Boone,* 4 Fed. Appx. 736, 742 (10th Cir. 2001), an unpublished decision in which we determined that there was insufficient evidence of sanity when the state's "rebuttal" of the defendant's experts' "overwhelming" testimony amounted to (1) a psychiatrist who offered "rambling" testimony, *id.* at 740 n. 3, with "little professional credibility," *id.* at 741, and who had not evaluated the defendant to determine his mental state at the time of the shooting, *id.*; (2) a neighbor of the victim who testified that the defendant appeared "nice" and "polite" when asking where the victim lived, *id.* (internal quotation marks omitted); and (3) a friend of the victim who reported that the victim was afraid because of a threatening phone call that he had received from the defendant, *id.* Of course, *Kiser* is not a binding precedent, and we express no opinion on whether its reasoning is persuasive. But in any event it is distinguishable in several respects. For example, unlike the state's expert in *Kiser,* Dr. Call focused on Mr. Diestel's state of mind at the time of the offense and provided the jury with a framework to use the lay testimony in reaching its conclusion regarding sanity.

Perhaps the real difficulty in Mr. Diestel's case is in defining what it means to know the difference between right and wrong. We do not say that a person cannot distinguish between right and wrong simply because he believed that the victim had done terrible things and therefore decided that the world would be better off without the victim. Every assassin presumably has such a belief, but not all assassins are legally insane. The insanity defense is limited to certain types of delusions. If the killer's mental illness caused him to believe that he had a warrant from the President or a command from God to kill the victim, he did not believe his deed was "wrong" and the insanity defense is available. Or if his mental illness caused him to believe that the victim was not a human being but an embodied evil spirit, he did not know the nature of his deed (the murder of a human being) and likewise has the defense. But a mentally ill person who decided to kill the victim because of the victim's imagined misdeeds may well have understood that the law and common morality do not permit one person to kill another for that misconduct; and such a person would not be legally insane.

This point was recognized at the very outset of the adoption of the M'Naghten test. The test is generally formulated, as in Oklahoma, as having two components. The defendant was legally insane when the act was committed if "he was suffering from a mental disease or defect rendering him [1] unable to differentiate between right and wrong, or [2] unable to understand the nature and consequences of his act." *Pugh,* 781 P.2d at 844. This proposition is a paraphrase of the Law Lords' answer in M'Naghten's Case, 8 Eng. Rep. 718 (1843), to two of five hypothetical questions (the second and third) posed by the House of Lords about the insanity defense (apparently because of concerns about the insanity acquittal of Daniel M'Naghten). The answers to the first and fourth questions, however, address the point of concern here. The first question was:

> What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons: as, for instance, where, at the time of the commission of the alleged crime,

> the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

Id. at 722 (internal quotation marks omitted). The answer was:

> [A]ssuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land.

Id.

The fourth question was: "'If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?'" *Id.* at 723. The answer was consistent with the first answer:

> [T]he answer must of course depend on the nature of the delusion: but, making the same assumption as we did before, namely, that he

> labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

Id.

Judge Cardozo, in the famous case of *People v. Schmidt,* 216 N.Y. 324, 110 N.E. 945 (1915), addressed the concern that the answer to the first question was inconsistent with the M'Naghten test expressed in the answers to the second and third questions. He found them compatible:

> The answer to the first question, though it seems to make the knowledge of the law a test, presupposes the offender's capacity to understand that violation of the law is wrong. It applies only to persons who "are not in other respects insane." We must interpret the answer in the light of the assumptions of the question. A delusion that some supposed grievance or injury will be redressed, or some public benefit attained, has no such effect in obscuring moral distinctions as a delusion that God himself has

> issued a command. The one delusion is consistent with knowledge that the act is a moral wrong, the other is not. . . . The real point of the inquiry was whether a defendant, who knew that the act was wrong, was excused because he had an insane belief that either personal or public good would be promoted by the deed. There was no thought of any conflict between the commands of law and morals.

Id. at 948. The one gloss added by Judge Cardozo to the Law Lords' answers is that one who knew that commission of the act was unlawful could still have been legally insane if he believed that the act was not contrary to common morality because, say, he thought that God had commanded it.

The views expressed by the Law Lords and Judge Cardozo are not mere ancient lore. The Model Penal Code (the MPC) appears consistent with those views. MPC § 4.01(1) states: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." The brackets around *wrongfulness* reflect that the Code presents two alternative formulations of the appreciation-of-right-or-wrong test. The defendant may "lack [ ] substantial capacity . . . to appreciate the *criminality*. . . of his conduct" or "lack[ ] substantial capacity . . . to appreciate the . . . *wrongfulness* of his conduct." *Id.* (emphasis added and brackets omitted). Of course, if the "criminality" formulation is adopted, one would not be entitled to the insanity defense merely because delusions caused him to believe that the victim had committed such horrible crimes as to be deserving of death. Even if the defendant thought that the world would be a better place without the victim, the defendant would be entitled to the defense only if he also believed that killing the victim would not violate the law.

Less obviously, but just as true, the "wrongfulness" formulation, which accords with Oklahoma law, would also not be available to one whose delusions related only to the extent of the victim's prior misconduct. The comment to MPC § 4.01 states: "Appreciating 'wrongfulness' may be taken to mean appreciating that the community regards the behavior as wrongful." *Id.* cmt. 3 at 169. In other words, so long as the defendant appreciated that the community at large would view the conduct as wrongful, the insanity defense is unavailable even if the defendant calculated that he would be performing a public good. The comment states that the two formulations would be little different in practice: "Given the seriousness of most crimes for which the defense of insanity is interposed, a defendant who appreciates society's moral disapproval of his conduct will almost always assume that the conduct is criminal, and vice versa." *Id.*[3]

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[3] The comment offered only two circumstances in which the difference in the two formulations could be significant:

> First, where the wrongfulness standard is taken to refer to the actor's own moral perception, then differing results are conceivable under the two formulations in a case in which the defendant thinks that an act he knows to be legally prohibited is commanded by God or otherwise

Turning to this case, the above authorities suggest that Mr. Diestel would not be entitled to an insanity defense if his paranoid schizophrenia operated only to make him believe that Casey was an evil man who raped women and set fires. If he nevertheless understood that "the community regards [the murder of rapists and arsonists] as wrongful," MPC § 4.01 cmt. 3 at 169, he would be criminally responsible. If, however, his delusions went further and he thought that he had a mandate from God or President Clinton to kill Mr. Casey, or if he believed that Casey was not

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> morally justified. However, even in such a case, a defendant in a jurisdiction having the criminality formulation could probably argue that his capacity to appreciate the criminality of his conduct was insubstantial or that he lacked substantial capacity to conform his conduct to legal requirements.
>
> The second conceivable situation is where the actor possesses a sense of right and wrong with respect to his actions, but, as a result of mental defect, is incapable of grasping the concepts of governmental prohibition and officially imposed sanctions which are implicit in the notion of criminality. However, in such a case as well, a defendant in a jurisdiction with the wrongfulness formulation might argue that, for purposes of determining criminal responsibility, his capacity for appreciating the wrongfulness of his conduct was insubstantial, or that, in light of his inability to understand what the law is, he was incapable of conforming his conduct to its requirements. Hence, notwithstanding the theoretical distinction between the two formulations, it is doubtful whether the actual result in many cases would turn on which is used.

Id. at 169-170 (footnote omitted).

really a human being and that killing him would only remove an evil spirit, then he would be legally insane. The dispositive question, then, is whether the jury could properly have found beyond a reasonable doubt that Mr. Diestel did not suffer from one of these further delusions. Although there was evidence that he suffered from each of these delusions, that evidence was much weaker than the evidence that his paranoid schizophrenia induced delusions that Mr. Casey had committed numerous rapes and arsons. In our view, it was not unreasonable for the OCCA to determine that there was sufficient evidence for the jury to believe beyond a reasonable doubt that Mr. Diestel was legally sane.

III. JURY INSTRUCTION

At trial Mr. Diestel sought the following jury instruction:

> Under the law of the State of Oklahoma and the facts in this case, if you find the Defendant, William James Diestel, guilty of Murder in the First Degree, you shall fix his punishment as either, imprisonment for life without parole or imprisonment for life. If you find the Defendant, Williams James Diestel, not guilty by reason of insanity, the Defendant shall be committed to a State Hospital for the Mentally Ill where he shall remain until released pursuant to the laws of the State of Oklahoma.

Aplt. Br. at 27 (internal quotation marks omitted).[4] The trial court rejected this instruction and did not instruct the jury at all on the consequences of a verdict of not guilty by reason of insanity (an NGI verdict). The OCCA affirmed the district court's rejection. Mr. Diestel contends that denial of the instruction violated his constitutional right to a fair trial.

Mr. Diestel is entitled to relief only if the OCCA's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). To make this showing, he must demonstrate that the state court either (1) "arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, or decided the case differently than the Supreme Court has on a set of materially indistinguishable facts," or (2) "identified the correct governing legal principle from the Supreme Court's decisions but unreasonably applied this principle to the facts of his case." *Lee v. Crouse,* 451 F.3d 598, 603 (10th Cir. 2006) (brackets and internal quotation marks omitted).

Mr. Diestel's precise argument is unclear. He seems to contend that the OCCA incorrectly applied *Shannon v. United States,* 512 U.S. 573, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994). Shannon was convicted of unlawful possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1), after he shot himself in the chest in the presence of a police officer. At trial

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[4] The proposed instruction does not appear in the record, but the state does not dispute that it was requested.

Shannon claimed to be insane and unsuccessfully sought a jury instruction that an NGI verdict would result in his being involuntarily committed. After being convicted at trial, he appealed the denial of the instruction, arguing that both the Insanity Defense Reform Act of 1984 and "general federal criminal practice," *id.* at 584, 114 S.Ct. 2419, required the instruction. The Supreme Court rejected both arguments.

Thus, *Shannon* decided that an instruction concerning the results of an NGI verdict was *not* required. Although the Court recognized that such an instruction might be necessary in "certain limited circumstances," 512 U.S. at 587, 114 S.Ct. 2419, the only example provided by the Court of such a circumstance was a statement to the jury by a prosecutor or witness that the defendant would "go free" if the jury returned an NGI verdict. *Id.* (internal quotation marks omitted). That circumstance is not present here. Furthermore, *Shannon* was interpreting the requirements of (1) the Insanity Defense Reform Act of 1984, 18 U.S.C. §§ 17, 4241-4247, a federal statute governing federal criminal law and procedure, and (2) "general federal practice" under the Supreme Court's "supervisory power over the federal courts," *Shannon,* 512 U.S. at 575, 584, 114 S.Ct. 2419. Neither would govern a state prosecution.

Mr. Diestel argues that *Shannon* should be distinguished because Oklahoma juries, unlike federal juries, have a role in sentencing. But that argument does not avail him. It would not be enough under AEDPA for Mr. Diestel to show that a Supreme Court decision does not contradict his contention. Rather, he must show that a Supreme Court decision has clearly adopted his contention. This he has failed to do. The OCCA's decision did not contradict or misapply "clearly established Federal law, as determined by the Supreme Court of the United States."§ 2254(d)(1). Therefore, we cannot grant Mr. Diestel relief on this ground.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment.

HENRY, J., concurring.

I concur, based upon our standard of review, but write separately to note that this is a close and difficult case. The expert evidence in this case is one-sided, strongly suggesting that Mr. Diestel "was being directed by hallucinations," Rec. vol. VI, at 30, and thus was "incapable of knowing [the] wrongfulness" of his actions at the time of this tragic murder. Okla. Stat. Ann. tit. 21, § 152(4). Dr. John Call, the State's expert witness, chose not to testify as to the ultimate issue of fact, although Oklahoma law allows it. Further troubling is the Oklahoma Court of Criminal Appeals' (OCCA) heavy reliance upon lay testimony of strangers—people who did not know or had merely had a casual brush with Mr. Diestel. *See Kiser v. Boone,* 4 Fed. Appx. 736, 742 (10th Cir. 2001) (granting habeas relief for insufficiency of evidence that defendant was sane at the time of the homicide and noting that "'[b]efore a non-expert witness is competent to testify to the sanity or insanity of another person, he must show an acquaintance of such intimacy and duration as to clearly indicate that his testimony will be of value in determining the issue'") (quoting *McKenzie v. United States,* 266 F.2d 524, 526-27 (10th Cir. 1959)). Finally, I also take this opportunity to comment on a new and salutary development in Oklahoma law, which adopts the instruction Mr. Diestel unsuccessfully requested at trial, and would have helped in this case.

1. Oklahoma's Evidentiary Rules

Unlike the Federal Rules of Evidence, Oklahoma law permits experts to testify as to whether a criminal defendant did or did not have the requisite mental state to commit the crime with which he has been charged. *Compare* 12 Okla. Stat. § 2704 ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.") *with* FED. R. EVID. 704(b) (prohibiting experts from testifying as to whether a criminal had "the mental state or condition constituting the mental state element of the crime charged"). Thus, under Oklahoma law, "[a]ny properly qualified expert testifying in accordance with the standards governing admissibility of expert testimony may offer an opinion on the ultimate issue if it would assist the trier of fact." *Johnson v. State,* 95 P.3d 1099, 1104 (Okla. Crim. App. 2004). Further, under Oklahoma law, "expert witnesses can suggest the inference which jurors should draw from the application of specialized knowledge to the facts." *Romano v. State,* 909 P.2d 92, 109 (Okla. Crim. App. 1995). However, Oklahoma law does not permit "opinion testimony which merely tells a jury what result to reach. . . ." *Id.*

Like Mr. Diestel's expert witnesses, Dr. Therese Hall and Dr. John Smith, Dr. Call, the State's expert, could properly have testified as to whether Mr. Diestel had the mental capacity to have been criminally responsible. *See Coddington v. State,* 142 P.3d 437, 449 (Okla. Crim. App. 2006) ("Experts for the State routinely testify to conclusions drawn from their specialized knowledge even on ultimate issues."); *see also Lott v. State,* 98 P.3d 318, 342-343 (Okla. Crim. App. 2004) (holding that the State's expert on sexual assault could properly testify rape was result of non-consensual sex and conclude that oral sodomy had occurred based upon her examination of physical evidence); *Abshier v. State,* 28 P.3d 579, 604 (Okla. Crim. App. 2001) (concluding that the State's expert witness could testify that a child was conscious and crying during beating from defendant based upon his experience and studies), *rev'd on other grounds by Jones v. State,* 134 P.3d 150 (Okla. Crim. App. 2006); *Welch v. State,* 2 P.3d 356, 368-369 (Okla. Crim. App. 2000) (holding that the trial court did not err in allowing detective's testimony that victim's death was not accidental but intentionally inflicted).

Oklahoma law is perhaps superior to the Federal Rules: it seems to me if a qualified psychologist, or, better yet, the "only board-certified forensic psychologist" in the state, Maj. Op. at 1263, has a clear opinion about whether a person knows the difference between right or wrong, it may well be helpful to a fair resolution of the case that he or she express it.[1]

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[1] Indeed, it appears that the OCCA believes that Dr. Call has expressed such an opinion before. *See Reid v. Boone,* 27 Fed. Appx.

2. Use of lay testimony

I am also troubled by the fact that the OCCA justified its decision in part by relying on the lay testimony of people that had no connection with the defendant at all. We condemned similar evidence in *Kiser v. Boone,* 4 Fed. Appx. 736, 742 (10th Cir. 2001). Although *Kiser* is unpublished, its reasoning is the most analogous in our circuit.

In that case, the State's expert examined Mr. Kiser, the defendant, who had shot his wife's romantic partner one day after his wife filed for divorce, to determine whether or not Mr. Kiser was competent to stand trial. The expert did not examine Mr. Kiser to determine whether Mr. Kiser was sane at the time of the murder. *Id.* at 740. Mr. Kiser presented two experts, each of whom testified that he did not appreciate the wrongfulness of his actions at the time he shot the victim. *Id.* at 739. The State relied on lay witnesses to establish Mr. Kiser's sanity. A neighbor of the victim testified that the defendant, whom he had not previously met, appeared "nice" and "polite" on the day of the shooting. *Id.* at 741. A friend of the victim, who did not know Mr. Kiser before, testified to a conversation he had with the victim during which the

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959, 962 (10th Cir. 2001) ("Dr. Call testified that, at the time of the killing, [the defendant] was suffering from a substance induce[d] psychotic disorder that included hallucinations. However, Dr. Call further testified that [the defendant] knew that he was committing a murder and knew that it was wrong.") (internal quotation marks and citations omitted).

victim confided his concern about a telephone call from Mr. Kiser threatening to kill him. *Id.*

The jury convicted Mr. Kiser of first degree murder, and the OCCA denied relief, finding Mr. Kiser's evidentiary sufficiency challenge to be meritless. 4 Fed.Appx. at 741 (quoting *Kiser v. State,* 782 P.2d 405, 407 (Okla.Cr.App.1989)). The federal magistrate judge reviewing Mr. Kiser's habeas petition recommended that relief be granted and the district court agreed. *Id.* Reviewing with AEDPA deference, we discounted the lay testimony provided by the two witnesses who had "no previous association" with Mr. Kiser. *Id.* at 742 (citing *McKenzie,* 266 F.2d at 526-27); *see also United States v. Madrid,* 673 F.2d 1114, 1123 (10th Cir. 1982) (applying *McKenzie*); *United States v. Coleman,* 501 F.2d 342, 345 (10th Cir. 1974) (same).

The *Kiser* court also rejected the OCCA's conclusion that the State expert had refuted the defense experts' testimony because the State's expert had acknowledged that he did not examine the defendant to ascertain the defendant's mental state at the time of the killing. Thus, the panel held that the defense experts' testimony "was overwhelming in light of the state's insufficient and indefinite evidence of his sanity." 4 Fed. Appx. at 741.

In this case, the jury was presented with only mildly conflicting medical testimony regarding Mr. Diestel's condition. Unlike in *Kiser, all experts agreed* as to the severity of and the existence of Mr. Diestel's paranoid schizophrenia. Admittedly, the State's expert in *Kiser* only evaluated Mr. Kiser for competency, and here, "Dr. Call focused on Mr. Diestel's state of mind at the time of the offense." Maj. Op. at 1272. However, Mr. Diestel's defense seems significantly stronger-unlike in *Kiser,* the State's expert here did not suggest the defense was a "cop out" or "nonsense." 4 Fed. Appx. at 740.

Additionally, the State presented *no* lay testimony from *any* witness who had *any* previous association with Mr. Diestel before briefly encountering him on the day of the shooting. We acknowledge, as the State points out, "[l]ay witnesses can testify about their observations of defendants if those observations are reasonably proximate in time to the proceedings." *McGregor v. State,* 885 P.2d 1366, 1374 (Okla. Crim. App. 1994). Oklahoma law also allows "[l]ay witnesses [to] give an opinion as to whether a defendant knew right from wrong at the time of crime if the opinion is rationally based on witness perception and helpful to a clear understanding of the testimony or determination of the fact in issue." *Id.* (emphasis added). "A jury can disregard entirely the testimony of psychiatric or medical experts and find sanity from the testimony of lay witnesses alone." *Id.* at 1376.

It is worth noting, however, that in *McGregor,* a fellow inmate who had observed the defendant over a period of time provided testimony regarding the defendant's competency. Here, none of the State's lay witnesses had "an acquaintance" with Mr. Diestel of any "intimacy" over a period of time of any significance. *McKenzie,* 266 F.2d at 526.

Given the above and given what Dr. Call said regarding Mr. Diestel's mental state,[2] I cannot say that, absent AEDPA's strictures, I could affirm the OCCA's legal conclusion that Mr. Diestel was sane at the time of the crime.

3. Not Guilty by Reason of Insanity Jury Instruction

Finally, as to the requested jury instruction, the consequences of a verdict of not guilty by reason of insanity in Oklahoma is clear: the court

> shall thereupon order the defendant committed to the state hospital for the mentally ill, or other state institution provided for the care and treatment of cases such as the one before the court, until the sanity and soundness of mind of

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[2] Dr. Call's testimony noted that Mr. Diestel:

- had "command delusions," Supp. Rec. vol. VI, at 21;
- suffered from paranoid schizophrenia prior to and on the date of the homicide, *id.* at 24, 26, 31, 32;
- thought his victim was "Nero reincarnated," *id.* at 31;
- was "mentally disturbed," *id.* at 24;
- had a lengthy obsession with the victim, that "even to a psychologist" would be a "red flag," *id.* at 25;
- was found not competent to stand trial on Nov. 9, *id.* at 27;
- believed he was being directed by hallucinations, and that "he believed that he had this delusion that the individual and the victim was [sic] Nero and a bad person and that he needed to do something to this fellow," *id.* at 30; or, as he puts it again "That he also believed that Mr. Casey was an evil man, the Roman Emperor Nero reincarnated, a man who raped a woman and who set fires in California." *Id.* at 31.

> the defendant be judicially determined, and such person be discharged from the institution according to law.

Okla. Stat. Ann., tit. 22, § 925.

Mr. Diestel proposed the following instruction, which the trial court refused to give:

> Under the law of the State of Oklahoma and the facts of this case, if you find the Defendant, William James Diestel, guilty of Murder in the First Degree, you shall fix his punishment as either, imprisonment for life without parole or imprisonment for life. If you find the Defendant, William James Diestel, not guilty by reason of insanity, the Defendant shall be committed to a State Hospital for the Mentally Ill where he shall remain until released pursuant to the laws of the State of Oklahoma.

Aple's App. at 32.

In denying relief on this claim, the Court of Criminal Appeals quoted from its decision in *Ullery v. State,* 988 P.2d 332, 346 (Okla. Crim. App. 1999):

> Ullery claims he was denied due process and a fair trial by the trial court's refusal to instruct the jury on the dispositional consequences of a not guilty by reason of insanity verdict. Ullery never contested the State's allegation that he killed Neal. During individual voir dire counsel told prospective jurors that Ullery admitted the killing and relied solely on his insanity defense.

> *The trial court denied Ullery's repeated requests to instruct the jury on the consequences of a verdict of not guilty by reason of insanity, as well as his offer of testimony on this issue. . . .*
>
> The[ ] trial court based its rulings in a belief that an instruction on the consequences of a not guilty by reason of insanity verdict is not permitted. *This Court has held failure to give such an instruction was not error because the statutory mandatory commitment procedures are "merely a procedural statement of disposition subsequent to the verdict and [are] immaterial to the process of rendering a verdict concerning the sanity of the accused."* The United States Supreme Court held in *Shannon v. United States,* [512 U.S. 573, 575 (1994)], *that federal law does not require this instruction.* The Supreme Court analogized to the situation where the State fails to meet its burden of proof regarding guilt, noting there the system assumes a juror will vote to acquit even if the juror is convinced the defendant is dangerous and should be imprisoned. We decline to revisit these decisions in this case. This proposition is denied.

Diestel v. State, No. F-2001-1501 slip op. at 12-13 (filed Nov. 13, 2002) (quoting *Ullery,* 988 P.2d at 346) (emphasis added) (footnotes and some internal citations omitted).

But the distinction between *Shannon,* which applied federal law, and Oklahoma law, is noteworthy: "In reaching its conclusion, the Court noted the well-established principle that, 'when a jury has no sentencing function, it should be admonished to reach its verdict without regard to what sentence might be imposed.'"*Neely v. Newton,* 149 F.3d 1074, 1085 (10th Cir. 1998) (quoting *Shannon,* 512 U.S. at 579, 114 S.Ct. 2419) (internal quotation marks omitted). Under Oklahoma law, there is no question that the jury serves the *absolute* sentencing function. Moreover, the jurors in *Shannon,* unlike the jurors here, were instructed to disregard the consequences of their verdict.

In *Fears v. State,* No. F-2004-1279 (Okla. Crim. App. filed July 7, 2006),[3] the OCCA held that "[l]aw,

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[3] *Fears* was filed after the Magistrate Judge issued her report and recommendation (April 13, 2006) (which recommended the grant of habeas relief as to the sufficiency of evidence), and after the district court filed its order denying federal habeas relief (June 21, 2006). As the State points out, Mr. Diestel did not file an objection to the magistrate judge's report and recommendation regarding the NGRI jury instruction. "[W]e have adopted a firm waiver rule when a party fails to object to the findings and recommendations of the magistrate [judge]." *Moore v. United States,* 950 F.2d 656, 659 (10th Cir. 1991).

Under our "firm waiver rule," a party who fails to file timely objections to a magistrate judge's report and recommendation waives appellate review. *Wirsching v. Colorado,* 360 F.3d 1191, 1197 (10th Cir. 2004) (internal quotation marks omitted).

The firm waiver rule, however, does not apply (1) when a pro se litigant was not notified of the time period for filing an objection and the consequences for failing to do so, (2) when the interests of justice warrant, or (3) when the party that failed to object makes a showing of plain error. *See Wardell v. Duncan,* 470 F.3d 954, 958 (10th Cir. 2006). Here, we granted a certificate of appealability because Mr. Diestel had "demonstrate[d] that logic, fundamental fairness and common sense require that juries be told [of] the consequences of their verdict, not guilty by reason of insanity." *Id.* slip. op. at 19. As the OCCA points outs, at least twenty-five states require a jury instruction on the consequences of a verdict of not guilty by reason of insanity, and eleven require the instruction by statute. *Id.* at 11-13 & nn. 26-27. "In most of these jurisdictions, juries do *not* impose sentence." *Id.* at 12-13. The *Fears* decision, which I recognize is unpublished and which is not retroactive to cases on habeas review, laudably recognizes that Oklahoma jurors imposing sentences must be informed of accurate information about sentencing consequences. *Id.* at 14.

Fears brings Oklahoma law in line with the recommendations of both the National Alliance of Mental Illness (NAMI) and the American Bar Association (ABA). NAMI has long urged the following:

> At the very least, judges should be required to instruct juries . . . as to what will happen to a defendant found not guilty by reason of insanity: that they will be hospitalized in secure facilities for treatment, and if they ever recover

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reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" and therefore made "a substantial showing of the denial of a constitutional right." *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); 28 U.S.C. § 2253(c)(2)-(3). There is little doubt that such showing, bolstered by the OCCA's *Fears* decision, which signifies a tactical shift in the OCCA's approach to NGRI jury instructions requires our review in the interest of justice.

> sufficiently to return to the community, they will be subject to continued monitoring.[4]

Similarly, the ABA has concluded that a "court should instruct the jury as to the dispositional consequences of a verdict of not guilty by reason of [insanity]." ABA, Criminal Justice Mental Health Standards § 7-6.8 cmt. at 342 (1986) (brackets in original). "[J]urors who are not informed about dispositional consequences will speculate about the practical results of a nonresponsibility verdict and, in ignorance of reality, will convict persons who are not criminally responsible in order to protect society." *Id.* at 345. The ABA concluded that an instruction was "the most sensible approach given the potential for prejudice," *id.*, when no instruction is provided, and observed the following:

> Particularly in cases in which defendants are charged with violent crimes (which is usually the case if the nonresponsibility issue is tried to a jury, as opposed to a judge), juries need to be told about the effect of a finding of mental nonresponsibility [insanity] if the possibility of a serious injustice is to be avoided.

Id. (brackets in original).

In the end, I would prefer that the proposed instruction had been given, as it seems the "most sensible approach" as held in *Fears*. *See* slip op. at 19. I thus agree that, given AEDPA deference, the OCCA did not unreasonably apply federal law as to the sufficiency of the evidence regarding Mr. Diestel's mental state. I also agree that the OCCA did not misapply clearly established *federal* law when it refused to give the now-approved *Fears* instruction. If Mr. Diestel did know the difference between right and wrong at the time of the horrible murder of Mr. Casey, Mr. Diestel deserves the sentence he received. If, as considerable evidence indicates, Mr. Diestel is seriously mentally deranged, life imprisonment in a maximum security prison seems unlikely to be an intelligent choice. Had *Fears* been the law, we would have a better idea of what the jury believed to be the truth.

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[4] Richard Birkel, Ph.D, NAMI National Director, and Mark Hardwick, Ph.D., President, NAMI Texas, *Change the Law Instead,* available at http://www.namiscc.org/newsletters/February02/AndreaYates.htm.

LUCERO, J., concurring.

I join the majority opinion, save the discussion of Fed. R. Evid. 704(b) on pages 1269-70, and I join as well Part 1 of Judge Henry's concurrence relating to the applicable Oklahoma evidentiary rule. I write separately to note my disagreement with reliance on the Federal Rules of Evidence in evaluating the sufficiency of the evidence in a state court case. Maj. Op. at 1269.

It is not ours to speculate about how the evidence might have been interpreted if the trial had occurred in federal court. *Id.* at 1270 ("[W]hen assessing the reasonableness of the verdict, it is worth noting that the evidence on which Mr. Diestel most relies would not even have been admissible in a federal trial."). Although AEDPA requires us to determine if the state court decision involves an unreasonable application of federal law, this duty is not an invitation to apply federal procedural rules to state court proceedings. Federal Rules of Evidence are irrelevant to this case. Future litigants should not be able to cite to the federal rules when arguing the sufficiency of the evidence in state court proceedings.

As Judge Henry notes, the applicable Oklahoma evidentiary rule allows experts to testify to ultimate issues, whereas Rule 704(b) does not. Because Rule 704(b) is both inapplicable and in direct conflict with the state rule, its citation is particularly inappropriate.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 06-7070
(D.C. NO. 03-CV-170-JHP)

[Filed November 1, 2007]

WILLIAM JAMES DIESTEL,)
Petitioner-Appellant,)
)
v.)
)
REGINALD HINES, Warden,)
Lexington Correctional Center,)
Lexington, Oklahoma,)
Respondent-Appellee.)
)

JUDGMENT

Before HENRY, LUCERO, and HARTZ, Circuit Judges.

This case originated in the Eastern District of Oklahoma and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court

/s/
ELISABETH A. SHUMAKER, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. CIV 03-170-JHP

[Filed June 21, 2006]

WILLIAM JAMES DIESTEL,)
)
Petitioner,)
)
v.)
)
JAMES HINES, Warden,)
)
Respondent.)
)

ORDER AFFIRMING IN PART AND REVERSING IN PART THE FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

On March 28, 2003, Petitioner William James Diestel, an inmate currently incarcerated at Lexington Correctional Center in Lexington, Oklahoma, commenced this action with the filing of a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in this Court. Petitioner challenges his conviction for

First Degree Murder in Marshall County District Court case number CF-2000-152 on grounds that (1) the State presented insufficient evidence to prove beyond a reasonable doubt that Mr. Diestel was sane at the time of the homicide; and (2) the trial court's failure to instruct the jury on the consequence of a not guilty by reason of insanity (NGRI) verdict violated Mr. Diestel's right of due process right and a reliable determination of guilt.

On March 16, 2006, the United States Magistrate Judge entered findings and recommendations to the effect that Ground I warrants habeas corpus relief, but Ground II does not. The State timely filed Objections to the Magistrate Judge's Report on April 12, 2006, in which the State asserts that the Magistrate Judge erroneously substituted her judgment for that of the Oklahoma Court of Appeals instead of applying the principles of "deference squared" required under law on habeas review in order to reach her conclusions as to Ground I. *See Torres v. Lytle*, No. 03-2098, 90 Fed. Appx. 288, 290 (10th Cir. Jan. 23, 2004). No objections were raised as to the Magistrate Judge's findings on Ground II, and such findings are therefore adopted by this Court.

With regard to Ground I, the Magistrate Judge found that the State did not prove beyond a reasonable doubt that Petitioner was sane at the time of the homicide. Specifically, the Magistrate Judge noted that all three experts at Petitioner's trial agreed that Petitioner suffered from paranoid schizophrenia. In support of Petitioner's NGRI defense, one of Petitioner's two experts noted that Petitioner was initially found to be incompetent to stand trial. The expert said that Petitioner was delusional, and that delusional people may be unable to distinguish right from wrong. The other of Petitioner's experts emphatically testified that Petitioner did not know right from wrong at the time of the shooting.[1] In contrast, the State's expert expressed no opinion on the issue.

The Magistrate Judge further found that the Oklahoma Court of Criminal Appeals' attempt to justify the jury's finding of sanity was contrary to the evidence and inconsistent with federal law. Under the *M'Naghten* test, the NGRI verdict is appropriate if the defendant (1) cannot appreciate the nature and consequence of his actions, **or** (2) cannot differentiate between right and wrong at the time of the crime. *See Pugh v. State*, 781 P.2d 843, 844 (Okla. Crim. App. 1989 (applying *Regina v. M'Naghten*, 10 Cl. and Fin. 200, 8 Eng. Rep. 718 (1843)). The two prongs are disjunctive and separate ways of determining that a defendant is legally insane. *Id.* at 845. If the defendant is able to raise some doubt as to his sanity, the burden shifts to the State to prove beyond a reasonable doubt that the defendant was sane. *Clark v. State*, 718 P.2d 375, 377-78 (Okla. Crim. App. 1986). Both the dissenting judge in the Oklahoma Court of Criminal Appeals' opinion and the Magistrate Judge on habeas review found that "the [OCCA] majority opinion's statement [that] the 'Appellant did not meet his burden of raising a reasonable doubt as to his sanity [at] the time of the crime' is not only erroneous, it does not respond to the proposition of error raised." Nonetheless, the OCCA concluded, and the Respondent here urges, that sufficient evidence of Petitioner's sanity at the time of the crime was presented to support the jury's findings.

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[1] Dr. Smith testified that "if you put yourself inside of [Petitioner's] head, believing that you are saving the world and saving your family because an evil spirit has inhabited someone and that you have been dictated to exorcise that evil spirit, then you can understand that [Petitioner] believed he was doing the right thing and did not have an ordinary man's concept of right and wrong in relationship, specifically, to [the victim]. So at that moment in time he could not distinguish[,] because of a severe mental illness[,] between right and wrong. He believed he was doing the right thing in relationship to the world and in relationship to his religious beliefs."

"Sufficiency of the evidence can be considered to be a mixed question of law and fact." *Case v. Mondagon*, 887 F.2d 1388, 1392 (10th Cir. 1989), *cert. denied*, 494 U.S. 1035 (1990). "To be sufficient, the evidence supporting the conviction must be substantial; that is, it must do more than raise a mere suspicion of guilt." *Beachum v. Tansy*, 903 F.2d 1321, 1332 (10th Cir.), *cert denied*, 498 U.S. 904 (1990). In federal habeas corpus review of a state court conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, **any** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Further, "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.* at 326.

This Court commends the Magistrate Judge's Report and Recommendation as thorough and thoughtful, and fully agrees with the Magistrate Judge's characterization of this case as "tragic." However, upon full consideration of the issues presented **in the light most favorable to the prosecution**, as required, this Court finds that the "jury's resolution of the evidence . . . is within the bounds of reason." *See Grubbs v. Hannigan*, 982 F.2d 1483, 1487 (10th Cir. 1993). In so finding, the Court does not mean to imply that **it** believes that the evidence at trial established Petitioner's sanity beyond a reasonable doubt, but rather, that it defers to the jury's apparent findings on this issue. The Magistrate Judge's Report and Recommendation is accordingly REVERSED insofar as it recommends Petitioner be granted habeas corpus relief on Ground I.

In support of this ruling, the Court specifically finds that the jury could have reasonably determined that Petitioner's acts constituted an intentional "revenge killing," based in part upon testimony that Petitioner asked the victim, "Do you remember me?" before shooting him, and that Petitioner's stories about the evil spirit of Nero inhabiting the victim's body did not surface until some time after the crime when he was examined by the medical experts. The Court also notes that even where four out of five experts testify that a defendant is legally insane, there may still be sufficient evidence to convict. *See U.S. v. Madrid*, 673 F.2d 1114, 1123 (10th Cir. 1982); *see also Valdez v. Ward*, 219 F.3d 1222, 1238 (10th Cir. 2000) ("Despite the relative strengths of the expert testimony, only the fact-finder may determine whether the defendant was legally sane."). Such is the case here. In Oklahoma, "[t]he State can disprove insanity by lay testimony as well as expert testimony," and "nothing in the case law requires the State to produce expert testimony" at all. *See Cheney v. State*, 909 P.2d 74, 86 (Okla. Crim. App. 1995). In the instant case, the Oklahoma Court of Criminal Appeals noted that the State's expert, while not specifically opining on Petitioner's ability to distinguish right from wrong at the time of the crime, did state that had Petitioner "truly believed he had done a good thing by shooting the victim, he would have said so," and that he may have been able to distinguish right from wrong, even in a delusional state. Thus, the State did offer some competent expert testimony to refute that put on by Petitioner, as well as persuasive lay testimony, which the jury could have judged as sufficient and credible evidence to prove beyond a reasonable doubt that Petitioner was sane at the time of the crime. *See id.* ("The jury is the exclusive judge of the weight of the evidence and the credibility of the witnesses' testimony[, and a]lthough there may be conflict in the testimony, if there is competent evidence to support the jury's finding, an appellate court will not disturb the verdict on appeal.").

For the reasons stated above, the Court reverses in part the Report and Recommendation of the United States Magistrate Judge insofar as it recommends Petitioner be granted habeas corpus relief on Ground I. The Report and Recommendation is, however, affirmed and adopted in all other respects. Accordingly, the Petition for Writ of Habeas Corpus is hereby DENIED and this action is DISMISSED.

IT IS SO ORDERED this 21st day of June 2006.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. CIV 03-170-P

[Filed March 16, 2006]

WILLIAM JAMES DIESTEL[1],)
)
Petitioner,)
)
v.)
)
JAMES HINES, Warden,)
)
Respondent.)
)

REPORT AND RECOMMENDATION

NOW before the Magistrate Judge is petitioner's petition for a writ of habeas corpus. Petitioner, an inmate currently incarcerated at Lexington Correctional Center in Lexington, Oklahoma, attacks his conviction in Marshall County District Court Case

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[1] Petitioner's name is incorrectly spelled *Dietsel* in many documents in the record.

Number CF-2000-152 for First Degree Murder. He sets forth the following grounds for relief:

I. The State presented insufficient evidence to prove that Mr. Diestel was sane beyond a reasonable doubt at the time of the homicide.

II. The trial court should have instructed the jury on the consequence of a not guilty by reason of insanity verdict. The failure to so instruct the jury violated Mr. Diestel's right of due process and a reliable determination of guilt.

The respondent concedes that petitioner has exhausted his state court remedies for the purpose of federal habeas corpus review and has submitted the following records to the court for consideration in this matter:

A. Petitioner's brief in his direct appeal.

B. The State's brief in petitioner's direct appeal.

C. Petitioner's reply brief in his direct appeal.

D. Opinion affirming petitioner's Judgment and Sentence. *Diestel v. State*, No. F-2001-1504 (Okla. Crim. App. Nov. 13, 2002).

E. Jury instructions in Marshall County District Court Case Number CF-2000-152.

F. Verdict form in Marshall County District Court Case Number CF-2000-152.

G. State court record and jury trial transcript in Marshall County District Court Case Number CF-2000-152.

Facts

The genesis of this tragic case can be traced back to California in 1989 when William "Bill" Dietsel, the petitioner, was approximately 21 or 22 years old, and Doug Casey, the victim, was about 16 years old (Tr. II 444, Tr. IV 587). Doug had been dating a girl for more than a year when he and his mother went out of town for a week or two (Tr. II 444). While they were gone, the girlfriend went out with Bill a couple of times (Tr. II 444). When Doug and his mother returned to California, the girlfriend told Doug that Bill was bothering her and would not leave her alone, so Doug went to where Bill worked and confronted him (Tr. II 444-45). Doug and Bill got into a fight, and the authorities became involved (Tr. II 445). Doug's mother was called to the hospital because Doug was thought to have a broken hand (Tr. II 445). The law enforcement officers asked Mrs. Casey if she wanted to file charges, because Doug was a minor and Bill was an adult, but she declined (Tr. II 445). Mrs. Casey just considered the incident a teenage confrontation, and she had no recollection of ever hearing the petitioner's name again (Tr. II 445). The Casey family moved to Oklahoma in 1993, when Doug was about 20 or 21 years old (Tr. II 441, 443).

The Oklahoma Court of Criminal Appeals (OCCA) set forth the facts of Doug's Casey's death in its Opinion affirming petitioner's Judgment and Sentence:

[Petitioner] was convicted of the first degree murder of Doug Casey. On October 27, 2000, at approximately 11:45 a.m. [petitioner] knocked on the door of the Casey home in rural Love County, Oklahoma. Carolyn Casey answered the door. [Petitioner] told her he was a friend of her son, Doug Casey, and asked if he was at work at the Chickasaw Pointe Golf Course. Mrs. Casey confirmed that her son was at work at the golf course. She inquired of [petitioner's] identity more than once. [Petitioner] would only say he was a friend from California wanting to look her son up. [Petitioner] left the Casey home in a bluish-green pickup with California license plates.

[Petitioner] arrived at the Chickasaw Pointe Golf Course in Kingston at approximately 1:45 p.m. He went into the pro shop and asked if Doug Casey was working. [Petitioner] was told that Casey was on the course mowing. [Petitioner] then asked what time the victim got off work. He was told probably around 3:00 p.m. [Petitioner] walked out of the pro shop with one of the employees and was directed to the maintenance building where the victim reported for work. Instead of walking in that direction, he went into the golf course restaurant. There, he sat at the bar and ordered a beer and a sandwich. While he was there, Doug Casey and another employee of the course came in for sodas. The victim was told that someone was looking for him, however Casey did not know who it would be. [Petitioner], still sitting at the bar, held an open newspaper in front of his face, as if to hide behind it. Doug Casey remained in the restaurant only a few minutes before heading back out to the golf course. [Petitioner] remained at the bar where he ordered another beer and ate a hamburger.

At approximately 2:30 - 3:00 p.m., the victim and fellow employee Terry Gable were in the maintenance building clocking out for the weekend. They then walked out to the parking lot to their cars. Parked next to Casey's truck was a bluish-green pickup with California license plates. As the victim approached his truck, [petitioner] stepped out between the vehicles and asked, "do you remember me?" Mr. Gable heard the victim say "oh shit" and run from the cars towards the maintenance building. The victim had run about 20 yards when [petitioner], bracing himself on his truck, fired three shots from a semi-automatic pistol. [Petitioner] stopped, walked forward, and fired off a second volley of shots. [Petitioner] looked at his gun, looked at Mr. Gable, looked back at his gun, then slowly walked back to his truck. [Petitioner] got inside his truck and drove away at a normal rate of speed.

The victim had run around the maintenance building before collapsing. He had been shot in the back of the neck and his carotid artery had been severed. Medical emergency personnel were called and quickly responded to the scene.[2] However, efforts to save him failed and Doug Casey died on the way to the hospital.

Meanwhile, the Kingston Police Department had been notified of the shooting. [Petitioner's] pickup was spotted on Highway 70 headed towards Ardmore. When Sergeant Remington of the Kingston Police Department activated his emergency lights and siren, [petitioner] pulled over to the side of the road. Before Sergeant Remington could stop his own vehicle, [petitioner] was out of his truck with his hands in the air. [Petitioner] complied with Sergeant Remington's request to lie on the ground. As he was being handcuffed, [petitioner] said the only reason he did it was because he raped a girl and set a bunch of fires in California. After he received *Miranda* warnings, [petitioner] repeated his statement. He then said he walked up to the victim, said "do you remember me," the victim started running, and he started shooting. When Sergeant Remington was updated on the victim's condition, [petitioner] asked if he (the victim) was going to be okay. [Petitioner] said he did not intend to kill the victim. When officers looked inside [petitioner's] pickup, they found a Hornaday 9X18 Makarov semi-automatic pistol. A bullet was in the chamber and 3 more were in the clip. Another loaded clip was found on the seat nearby.

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[2] The first Responder on the scene found Doug bleeding profusely, but still conscious (Tr. II 427). Doug said he did not know who shot him or why he was shot. (Tr. II 428, 430).

Diestel v. State, No. F-2001-1501, slip op. at 1-4 (Okla. Crim. App. Nov. 13, 2002). The state court's factual findings are presumed correct unless the applicant produces clear and convincing evidence to rebut the presumption. 28 U.S.C. § 2254(e)(1).

Ground I

Petitioner alleges he presented evidence at trial, through the testimony of his family members and two expert witnesses, that he was insane at the time of the homicide. He contends the State failed to produce any evidence that rebutted the insanity defense to prove beyond a reasonable doubt that he was sane.

Therese Hall, Ph.D, a forensic psychologist, evaluated petitioner while he was at Eastern State Hospital for a pretrial competency evaluation, and she initially found him not competent to stand trial (Tr. IV 9, 11-12, 27). In her evaluation of petitioner, Dr. Hall spoke with petitioner, reviewed his medical records, and interviewed his relatives (Tr. IV 12-13). Petitioner told Dr. Hall that over the past ten years he had become convinced that the victim was a type of demon named Nero, and Nero had been in California setting fires, raping women, and committing acts of vandalism (Tr. IV 13). Petitioner said he had visions of angels, and Jesus had directed him in a vision to travel to Oklahoma on a mission to cast down the demon (Tr. IV 13). Petitioner further related that Jesus had told him not to kill the demon, but to take control of him or render him helpless (Tr. IV 14). Petitioner's instructions included acting quickly while President Clinton still was in office, because Clinton would pardon him (Tr. IV 14).

Dr. Hall diagnosed petitioner with paranoid schizophrenia, a very serious mental illness, which she described as being out of touch with reality, usually because of hallucinations and/or delusions (Tr. IV 14-15). She stated that when an individual is delusional, his perception of right and wrong can be affected (Tr. 17). Dr. Hall further opined that there was no reason to believe that petitioner was not suffering from paranoid schizophrenia on the day of the murder (Tr. IV 17-18). Although paranoid schizophrenia does not necessarily equate with being insane, Dr. Hall stated that she had no reason to believe petitioner was not insane when he shot and killed the victim (Tr. IV 18-19, 25, 29). Petitioner's ability to make and execute plans for his trip to Oklahoma, to locate the victim, and to recall details of the events did not preclude the diagnosis of schizophrenia (Tr. IV 20). On cross examination Dr. Hall admitted she had told defense counsel on several occasions that she did not know whether petitioner was sane at the time of the killing (Tr. IV 22).

John Smith, M.D., a psychiatrist, testified that he talked to petitioner's mother an reviewed a letter she wrote to a psychiatrist describing petitioner's delusions prior to the shooting (Tr. V 3, 8). He also talked with petitioner about the shooting, reviewed information about the homicide, and reviewed medical records (Tr. V 6-9, 37). Dr. Smith stated that petitioner's hallucinations and delusions were characteristic of paranoid schizophrenia (Tr. V 9, 11-12). Petitioner told

Dr. Smith that for several years he had been gathering information about fires in California, reading messages from graffiti, and becoming increasingly convinced that the victim, who was the spirit of Nero, had to be captured and somehow brought down by some sort of exorcism or other way of ridding him of demons (Tr. V 9). Petitioner believed that if he did not perform this task, then Nero and the victim's body would bring extreme destructiveness to the world and to petitioner and his family (Tr. V 9). However, petitioner always indicated he did not intend to kill the victim; instead, he planned somehow to take him prisoner and strike him down (Tr. V 26).

Dr. Smith further testified that petitioner's planning before the killing and his calmness and coherence after the killing was consistent and even ordinary in paranoid schizophrenia (Tr. V 14). He further explained:

> . . . Paranoid schizophrenia, as opposed to certain other kinds of schizophrenia, does not interfere with organizational and cognitional abilities. Perhaps I could best tell you, the DSM-4 is the Diagnostic Manual of the American Psychiatric Association, and in the latest edition this is what they say about the issue: "These individuals usually show little or no impairment on neuropsychological or other cognitive testing." That means your ability to think and organize. "Some evidence suggests that the prognosis for the paranoid type may be considerably better than the other types of schizophrenia, particularly with regard to occupational functioning and capacity for

> independent living." Because there are so many paranoid schizophrenics who go on working and who are able as long as they are not living within the delusional system to go ahead and do other things that are not so conflictual. It's very confusing to people who have not studied paranoid schizophrenia because the person can appear in many situations as if they were normal and they're doing normal things, like planning, like going to work, but, in fact, their decision-making, if it's in relationship to the delusional system that's in the brain, is based on the delusional system. There are many things and cases where a paranoid schizophrenic either shot or killed someone in which it took elaborate planning for the killing and shooting to take place. The most famous one is when President Reagan was shot by a paranoid schizophrenic.

(Tr. V 14-15). In response to the question of whether petitioner knew right from wrong when he shot his victim, Dr. Smith answered:

> Within the context--if you put yourself inside of [petitioner's] head, believing that you are saving the world and saving your family because an evil spirit has inhabited someone and that you have been dictated to exorcise that evil spirit, then you can understand that he believed he was doing the right thing and did not have an ordinary man's concept of right and wrong in relationship, specifically, to [to victim]. *So at that moment in time he could not distinguish because of a severe mental illness between right*

> *and wrong.* He believed he was doing the right thing in relationship to the world and in relationship to his religious beliefs.

Tr. V 16-17 (emphasis added).

According to Dr. Smith, petitioner's hallucinations and delusions possibly were exacerbated by Prozac which was inappropriately prescribed for petitioner in California and which he was taking at the time of the shooting (Tr. V 18-19). Dr. Smith was certain petitioner was not malingering, because petitioner was very straightforward and honest, and petitioner was beginning to doubt the truth of his delusions and no longer was experiencing hallucinations (Tr. V 22, 48). Dr. Smith testified he could state to a reasonable medical certainty that "at the time of the shooting [petitioner] could not distinguish right from wrong" (Tr. V 72-73).

The State called Dr. John Call, a forensic psychologist, who specialized in violence issues such as workplace violence and stalking (Tr. VI 4). He testified that he interviewed and evaluated petitioner and one of the witnesses to the shooting (Tr. VI 6). He also had access to information from a telephone conversation between petitioner's sister and an assistant district attorney (Tr. VI 6). Dr. Call testified he had information that after the shooting, petitioner asked if the victim would live, and petitioner stated he did not intend to kill the victim (Tr. VI 9-10). Dr. Call opined that petitioner's statements after the shooting indicated that petitioner understood and appreciated what he had done, but petitioner believed the victim was the reincarnation of Nero (Tr. VI 10). Petitioner also believed that the victim, a reincarnation of Nero, had raped a woman, set wildfires in California, and had vandalized property near petitioner's places of employment (Tr. VI 19-20). The available information supported petitioner's diagnosis of paranoid schizophrenia, but it was possible that someone with the diagnosis could know his act was wrong (Tr. VI 11, 20-22, 24). Dr. Call would not express an opinion about whether petitioner knew the difference between right and wrong when he shot the victim, because that was a decision for the jury (Tr. VI 31- 32). The respondent claims Dr. Call did not answer the insanity question because it was an issue for the jury. Petitioner, however, maintains Dr. Call's reason was pretextual because Dr. Call knew that if he answered the question, it would be adverse to the State.

The respondent alleges the OCCA considered and found no merit in this claim in petitioner's direct appeal, and under the revised federal habeas corpus statutes, habeas corpus relief is proper only when the state court adjudication of a claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

"Sufficiency of the evidence can be considered to be a mixed question of law and fact." *Case v. Mondagon*, 887 F. 2d 1388, 1392 (10th Cir. 1989), *cert. denied*, 494 U.S. 1035 (1990). In federal habeas review of a state court conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). When reviewing issues of sanity, "a reviewing court must evaluate the evidence to determine whether 'any rational trier of fact' could have found the defendant sane beyond a reasonable doubt." *Valdez v. Ward*, 219 F.3d 1222, 1236 (10th Cir. 2000).

The Supreme Court has repeatedly emphasized the deference the reviewing court owes to the trier of fact and "the sharply limited nature of constitutional sufficiency review." *Wright v. West*, 505 U.S. 277, 296 (1992) (citing *Jackson*, 443 U.S. at 319). "[A] federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume--even if it does not affirmatively appear in the record--that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326. The court must "accept the jury's resolution of the evidence as long as it is within the bounds of reason." *Grubbs v. Hannigan*, 982 F.2d 1483, 1487 (10th Cir. 1993) (citing *United States v. Edmondson*, 962 F.2d 1535, 1548 (10th Cir. 1992)). "To be sufficient, the evidence supporting the conviction must be substantial; that is, it must do more than raise a mere suspicion of guilt." *Beachum v. Tansy*, 903 F.2d 1321, 1332 (10th Cir.), *cert. denied*, 498 U.S. 904 (1990) (citing *United States v. Troutman*, 814 F.2d 1428, 1455 (10th Cir. 1987)).

The *M'Naughten* rule is the test for insanity in Oklahoma. Okla. Stat. tit. 21 § 152(4). Further, in Oklahoma it is well established that the issue of insanity at the time a murder is committed is a question of fact for the jury. *Clark v. State*, 718 P.2d 375, 378 (Okla. Crim. App. 1986).

> A person is insane when that person is suffering from such a disability of reason or disease of the mind that he/she does not know that his/her acts or omissions are wrong and is unable to distinguish right from wrong with respect to his/her acts or omissions. A person is also insane when that person is suffering from such a disability of reason or disease of the mind that he/she does not understand the nature and consequences of his/her acts or omissions.

Medlock v. State, 887 P.2d 1333, 1342 n.12 (Okla. Crim. App. 1994).

The Court of Criminal Appeals examined petitioner's insanity defense as follows:

> [P]etitioner contends the State failed to prove beyond a reasonable doubt that he was sane at the time he shot and killed the victim. In *Ullery v. State*, 988 P.2d 332, 348 (Okla. Crim. App. 1999), we addressed the law of sanity/insanity as it currently exists in Oklahoma. This Court stated in part:

> Oklahoma law exempts from criminal responsibility those who, at the time of the crime, are incapable of knowing the wrongfulness of their act. Criminal defendants are presumed sane. The defendant has the burden of raising a reasonable doubt of his sanity at the time of the crime. *"If the defendant establishes a reasonable doubt of his sanity, the presumption of sanity vanishes and it is incumbent upon the State to prove beyond a reasonable doubt that the defendant could distinguish between right and wrong at the time of the offense."* The jury determines whether the State has met this burden. We recognize the general rule that, where any evidence tends to support the jury's finding that the State has met its burden, we will not disturb that finding on appeal.

988 P.2d at 348. *See also Taylor v. State*, 881 P.2d 755, 758 (Okla. Crim. App. 1994) (emphasis added).

The State's evidence showed the killing in this case was a "revenge killing." [Petitioner] and the victim had known each other in California approximately 12 years earlier. Apparently, one time when the victim went out of town, the young lady he was dating went out with [petitioner]. When the victim returned to town, the young lady told him that [petitioner] was bothering her and wouldn't leave her alone. Apparently, the victim went to [petitioner's] place of employment and beat him up.

> Although the victim eventually moved to Oklahoma and [petitioner] remained in California, [petitioner] never forgot the incident. Starting about 1992, [petitioner] began telling family members about delusions and hallucinations he was having which told him to strike down the victim. However, [petitioner] never mentioned these hallucinations to co-workers. [Petitioner] worked at the same restaurant for eight years starting as a busboy and advanced to working in the office and handling the money and making deposits.

Diestel, slip op. at 4-5.

> The defense presented several of [petitioner's] family members who testified that shortly after his father's death in 1992, [petitioner] said he was visited by angels and heard voices. As time went on, [petitioner] talked about the rape of a girl he once dated and wildfires that had burned in the area. [Petitioner] never mentioned the victim's name, but said the voices and angels were telling him to strike down the evil demon. [Petitioner] said he was going to capture the demon with handcuffs, just like a police officer would do. [Petitioner's] brother testified that based upon [petitioner's] statements, he thought [petitioner] was talking about the guy (the victim) who had beat him up previously. [Petitioner] also said that Mel Gibson talked and visited with him to help him figure out how to get rid of the demon. [Petitioner] later named the evil demon, Nero, and said he was a reincarnation of the Roman

> Emperor. Family members said [petitioner] became more religious, attended church and read the Bible. Family members said they urged [petitioner] to get help and for a while he received medication from his wife's father who was a psychiatrist. Family members testified [petitioner] was a heavy drinker, usually drinking only rum. They also testified [petitioner] had a gun, they took it away from him at one point, but then gave it back. They subsequently found out he had traded it for a more powerful gun. They testified that they never saw him act violently; therefore they never notified the authorities of his threats to strike down the evil demon. Family members also testified that after [petitioner] had been arrested for the shooting and incarcerated in the county jail, he called them and asked them to call the President of the United States to give him a pardon.

Id. at 8.

> Two or three days before the crime, [petitioner] left California. On October 27, 2000, he arrived in rural Love County looking for the victim's home. He first arrived at the Scott's home, southeast of Lake Murray. [Petitioner] asked Mrs. Scott if she knew where the Casey's [sic] lived. She told [petitioner] she thought they lived north of the water tower and pointed him in that direction. Mrs. Scott confirmed for [petitioner] that the whole area was [Route] HC70. Both Mrs. Scott and Mrs. Casey, who encountered [petitioner] only a few minutes

later, testified [petitioner] was clean-cut and nice looking with nothing in his demeanor that which [sic] would give them cause for concern. Found in [petitioner's] pickup after the shooting was a list of phone numbers to area golf courses. The victim had previously worked at at least two of the courses on the list. Prior to going to the victim's home, [petitioner] went to the Lakeview Golf Course in Ardmore, one of the golf courses on the list, and was told the victim no longer worked there. [Petitioner] was told the victim was working at Chickasaw Pointe. Armed with this information, [petitioner] went to the Casey home pretending to be a friend of the victim's.

Once at the Chickasaw Pointe Golf Course, [petitioner] specifically sought out the victim. In one of his later statements to the authorities, [petitioner] said he did not intend to kill the victim, but to capture him and take him into custody. [Petitioner] had an opportunity to do this in the golf club restaurant, but instead he hid behind a newspaper when the victim entered the room. Out in the parking lot, [petitioner] parked his pickup so as to block any exit by the victim's vehicle. When he saw the victim, he did not make any statements about Nero or his delusions, but simply asked if the victim remembered him. As the victim ran away, [petitioner] repeatedly fired at him, striking him in the back of the neck.

After the shooting, witnesses reported that [petitioner] calmly left the scene. When sighted

> by the authorities, petitioner was quick to comply with their orders. When he explained his actions, he never mentioned Nero or made any reference to his delusions.

Id. at 5-7.

> The experts in this case were consistent in their diagnosis that [petitioner] suffered from paranoid schizophrenia. However, evidence of a mental disability alone is not sufficient to establish insanity at the time of the offense. *Medlock*, 887 P.2d at 1342 n.12. Testimony in this case established that paranoid schizophrenia cannot be equated with insanity.
>
> The issue then becomes whether [petitioner's] mental disability so impaired his judgment that, at the time he killed the victim, he was incapable of appreciating the nature and consequences of his acts or knowing right from wrong. A review of [petitioner's] actions, prior to, during, and after the crime, shows that he knew right from wrong and was sane at the time of the crime. [Petitioner] apparently only told family members about his delusions and hallucinations. Co-workers in California had never heard those claims, and in fact testified that [petitioner] was a good employee with nothing in his demeanor to indicate he was having any mental problems. [Petitioner] left California specifically to travel to Oklahoma and find the victim. He obtained a list of golf courses in order to determine where the victim worked.

[Petitioner] purposefully deceived the victim's mother in order to locate the victim.

After the shooting, [petitioner] claimed he intended only to capture the victim and take him prisoner. If that were truly [petitioner's] intent, he did not take advantage of the numerous opportunities to do so--in the restaurant, in the parking lot. However, instead of taking him prisoner, [petitioner] shot the victim--not in the legs or the butt as he claimed was his intent, but in the back of the neck as the victim was running away. These actions support an inference that they were committed with the intent to kill the victim.

Again, after the shooting, there was no attempt to take the victim prisoner as he had collapsed behind the maintenance building out of [petitioner's] view. [Petitioner] merely left the scene, and did so in a calm manner. When it became apparent that the authorities were on to him, [petitioner] pulled his pickup over and exited it before the officer could even get his car stopped. Testimony from the arresting officers established that [petitioner] admitted shooting the victim and seemed to have no trouble understanding what was occurring. This behavior illustrates that [petitioner] was aware that his shooting of the victim was wrong.

Further, [petitioner's] stories about Nero and the evil demon did not surface until sometime after the crime when he was interviewed by the medical experts. [Petitioner] never said

> anything about the evil demon to the arresting officers. [Petitioner's] attempts to create an excuse that he merely intended to capture the victim and not kill him supports an inference that he understood that his actions were wrong.
>
> After a thorough review of the evidence presented by both parties, we find [petitioner] did not meet his burden of raising a reasonable doubt as to his sanity at the time of the crime. The evidence clearly supports the jury's determination that [petitioner] was sane beyond a reasonable doubt at the time he killed the victim.

Id. at 10-12.

The Court of Criminal Appeals correctly articulated the requirement that, once a criminal defendant has raised the issue of his sanity at the time of the crime, there no longer is a presumption of sanity, and "*it is incumbent upon the State to prove beyond a reasonable doubt that the defendant could distinguish beyond right and wrong at the time of the offense." Diestel*, slip op. at 4-5 (quoting *Ullery*, 988 P.2d at 348) (emphasis added). However, after analyzing the evidence presented at trial, the conclusion by the Court of Criminal Appeals was that *"[petitioner] didn't meet his burden of raising a reasonable doubt as to his sanity at the time of the crime." Diestel*, slip op. at 12 (emphasis added). The dissent in the appellate decision pointed out the error: "The majority opinion's statement the '[Petitioner] did not meet his burden of raising a reasonable doubt as to his sanity [at] the time of the crime' is not only erroneous, it does not respond to the proposition of error raised." *Diestel*, slip op. at 15 n.1 (Chapel, J., dissenting).

In the unpublished opinion of *Kiser v. Boone*, No. 00-7030, 2001 WL 193876 (10th Cir. Feb. 27, 2001), the Tenth Circuit Court of Appeals affirmed this court's determination that the evidence was not sufficient to find a petitioner sane beyond a reasonable doubt under the standard of *Jackson v. Virginia*. Two defense experts testified at trial that Mr. Kiser was legally insane, while the prosecution's expert witness testified that he had not examined Kiser for his mental state at the time of the crime. *Kiser*, 2001 WL 193876 at *3. The Tenth Circuit concluded that the testimony of the defense experts, "whose duty it was to determine Mr. Kiser's mental condition, was overwhelming in light of the state's insufficient and indefinite evidence of his sanity." *Id.* at *5.

After careful review, this court finds that habeas corpus relief is required in this case. The law on the insanity defense in Oklahoma is very clear: when the question of a defendant's sanity is put at issue, the State must prove beyond a reasonable doubt that the defendant was *sane* at the time of the offense. There is no question that petitioner suffered from a serious mental illness prior to the shooting, and that he made and carried out plans to locate and capture the victim, who petitioner believed was the incarnation of the Emperor Nero. Both of petitioner's expert witnesses supported the defense of petitioner's insanity at the time of the crime. Dr. Hall did not dispute petitioner's insanity at the time of the crime (Tr. IV 19), and Dr. Smith made a strong statement that petitioner's severe mental illness prevented him from distinguishing between right and wrong when he shot the victim (Tr. V 17, 72-73). The State's expert Dr. Call, on the other hand, did not have an opinion about petitioner's sanity at the time of the crime (Tr. VI 32). Therefore, Dr. Call's testimony clearly did not overcome the presumption of sanity, as required by Oklahoma law.

Furthermore, the Court of Criminal Appeals' attempts to justify the jury's sanity determination also falls short. The OCCA acknowledged petitioner's long history of telling family members about his delusions and hallucinations, but inexplicably found his failure to exhibit or articulate these symptoms to his coworkers was significant. *Diestel*, slip op. at 10. The OCCA also took petitioner's planning and deceit into account, despite expert testimony that the ability to plan is common in paranoid schizophrenia. *Id.* at 10-11. According to the OCCA, petitioner's failure to capture the victim, as he claimed was the plan, supported an inference that the crime was committed with the intent to kill the victim. *Id.* at 11. However, petitioner's intent to kill was not an issue in whether he was sane when he shot the victim. The OCCA also gave weight to petitioner's cooperation with law enforcement officers after the crime, *id.*, although there is no explanation of how this is evidence of sanity, given the expert testimony that petitioner's calmness and coherence after the shooting was consistent with his mental illness.

Finally, the OCCA points to petitioner's failure to tell the arresting officers about Nero as evidence of his sanity. *Id.* Those delusions were not revealed until he was interviewed by medical experts. *Id.* The OCCA viewed petitioner's actions after the crime as "attempts to create an excuse" that he planned to capture, not kill, the victim, and the OCCA inferred from those actions that petitioner knew his actions were wrong. *Id.* at 11-12. All of the Court of Criminal Appeals' inferences do not negate the defense experts' testimony that petitioner was insane when he shot the victim, and the inferences do not enhance the prosecution expert's lack of opinion regarding sanity. Based on this analysis, this court finds the evidence was insufficient under the standard of *Jackson v. Virginia*, and the Court of Criminal Appeals' determination was inconsistent with federal law, pursuant to 28 U.S.C. § 2254(d).

Ground II: Jury Instructions

Petitioner alleges in Ground II that the trial court should have instructed the jury on the consequences of a verdict of not guilty by reason of insanity. He contends that failing to give this instruction violated his right to a fair trial and a reliable determination of his guilt, and the failure so infected the entire proceedings that his conviction violated due process. He argues that by not telling the jury the consequences of a not guilty by reason of insanity verdict left the impression that there was, in fact, no consequence, and the defendant would be released.

The respondent alleges petitioner's claim in Ground II is an issue of state law that is not cognizable in a federal habeas proceeding. "[It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (citing 28 U.S.C. § 2241; *Rose v. Hodges*, 423 U.S. 19, 21 (1995) (per curium)).

> In a habeas corpus proceeding attacking a state court judgment based on an erroneous jury instruction, a petitioner has a great burden. *Lucan v. Tansy*, 2 F. 3d 1031, 1035 (10th Cir. 1993), *cert. denied*, 510 U.S. 1120 (1994). A state conviction may only be set aside in a habeas proceeding on the basis of erroneous jury instructions when the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial. *Shafer v. Station*, 906 F.2d 506, 508 (10th Cir. 1990), *cert. denied*, 498 U.S. 961 (1990). "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." *Henderson v. Kibe*, 431 U.S. 145, 154 (1977) (footnote omitted). The question in this proceeding is not whether the instruction is "undesirable, erroneous, or even 'universally condemned,'" but whether the instruction so infected the trial that the resulting conviction violates due process. *Id.* (quoting *Cpp v. Naughts*, 414 U.S. 141, 146 (1973)). "An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Id.* at 155. The degree of prejudice from the instruction error must be evaluated in the context of the events at the trial.

United States v. Fray, 456 U.S. 152 (1982).

MA v. Thomas, 46 F. 3d 979, 984 (10th Cir.), *cert. denied*, 514 U.S. 1115 (1995).

The disallowed jury instruction was as follows:

> Under the law of the State of Oklahoma and the facts of this case, if you find the Defendant, William James Diestel, guilty of Murder in the First Degree, you shall fix his punishment as either, imprisonment for life without parole or imprisonment for life. If you find the Defendant, William James Diestel, not guilty by reason of insanity, the Defendant shall be committed to a State Hospital for the Mentally Ill where he shall remain until released pursuant to the laws of the State of Oklahoma.

In denying relief on this claim, the Court of Criminal Appeals quoted from its decision in *Ullery v. State*, 988 P.2d 332, 346 (Okla. Crim. App. 1999):

> . . . Ullery claims he was denied due process and a fair trial by the trial court's refusal to instruct the jury on the dispositional consequences of a not guilty by reason of insanity verdict. Ullery never contested the State's allegation that he killed Neal. During individual voir dire counsel told prospective jurors that Ullery admitted the killing and relied solely on his insanity defense. The trial court denied Ullery's repeated requests to instruct the jury on the consequences of a verdict of not guilty by reason of insanity, as well as his offer of testimony on this issue. . . .

> They [sic] trial court based its rulings in a belief that an instruction on the consequences of a not guilty by reason of insanity verdict is not permitted. This Court has held failure to give such an instruction was not error because the statutory mandatory commitment procedures are "merely a procedural statement of disposition subsequent to the verdict and [are] immaterial to the process of rendering a verdict concerning the sanity of the accused." The United States Supreme Court held in *Shannon v. United States*, [512 U.S. 573, 575 (1994)], that federal law does not require this instruction. The Supreme Court analogized to the situation where the State fails to meet its burden of proof regarding guilt, noting there the system assumes a juror will vote to acquit even if the juror is convinced the defendant is dangerous and should be imprisoned. We decline to revisit these decisions in this case. This proposition is denied.

Diestel slip op. at 12-13 (quoting *Ullery*, 988 P.2d at 346 (footnotes omitted)).

After careful review, the court finds petitioner has failed to present an argument in Ground II supporting federal habeas relief.

ACCORDINGLY, the Magistrate Judge finds that Ground I of the petition warrants habeas corpus relief, because the evidence regarding petitioner's sanity was insufficient. The Magistrate Judge further finds that Ground II does not present a basis for habeas corpus relief.

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Local Rule 72.1(C), the parties are given ten (10) days from being served with a copy of these findings and recommendations to file with the Clerk of the Court any objections with supporting briefs. Failure to file timely written objections to the Magistrate Judge's recommendations may result in waiver of appellate review of factual and legal questions. *Talley v. Hesse*, 91 F.3d 1411, 1412-13 (10th Cir. 1996); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this day of March 2006.

/s/

KIMBERLY E. WEST
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. CIV 03-170-JHP

[Dated April 13, 2006]

WILLIAM JAMES DIESTEL,)
Petitioner,)
)
v.)
)
JAMES HINES, Warden,)
Respondent.)
)

CORRECTION ORDER

The Magistrate Judge's Report and Recommendation entered by the court on March 16, 2006, Docket Entry Number 16, is hereby corrected in the following respect:

The last sentence in the first full paragraph on page 15 is corrected to read:

"Therefore, Dr. Call's testimony clearly did not prove beyond a reasonable doubt that petitioner could distinguish between right and wrong at the time of the offense."

IT IS SO ORDERED this 13th day of April 2006.

/s/
KIMBERLY E. WEST
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

No. F-2004-1279

[Filed July 7, 2006]

DANIEL HAWKES FEARS,)
Appellant,)
)
v.)
)
THE STATE OF OKLAHOMA)
Appellee.)
)

OPINION

CHAPEL, PRESIDING JUDGE:

Daniel Hawkes Fears was tried by jury in the District Court of Sequoyah County, Case No. CF-2002-568, and convicted of Counts I and II, Murder in the First Degree in violation of 21 O.S.2001, § 701.7; Counts III - X, Shooting with Intent to Kill in violation of 21 O.S.2001, § 652(A); Counts XI, Discharging a Firearm with Intent to Kill in violation of 21 O.S.2001, § 652(A); Count XII, Feloniously Pointing a Firearm in violation of 21 O.S.2001, § 1289.16; and Counts XIII - XVII, Drive By Shooting in violation of 21 O.S.2001,

§ 652(B).[1] In accordance with the jury's recommendation the Honorable John Garrett sentenced Fears to two terms of life imprisonment without the possibility of parole, to run consecutively (Counts I and II); nine terms of life imprisonment in Counts III - XI, each to be served consecutively to Counts I and II and concurrently to one another; nine (9) years and one (1) day imprisonment in Count XII, to be served consecutive to Counts III - XI; and five terms of imprisonment for nineteen (19) years and one (1) day in Counts XIII - XVII, each to be served consecutively to Counts III - XI and concurrently with Counts XII - XVI. Fears appeals from these convictions and sentences.

On October 26, 2002, eighteen-year-old Daniel Fears drove to his father's house in Sallisaw, Oklahoma. His father was not home. Fears entered the neighborhood at a high rate of speed. He almost hit Ashley Hobbs, who was riding a bicycle. Fears parked in front of his father's house and started around to the back. Greg Caughman was in his yard nearby with several children. As he walked, Fears told Caughman to watch his kids. Caughman told Fears to watch his mouth. When Fears told Caughman again to watch his kids, Caughman invited him to come over if he had a problem. Fears never stopped moving throughout this exchange. Jill Caughman heard some of this conversation, and told Fears to watch his driving, but could not understand his reply. Fears said something the Caughmans could not understand and continued to the back door. He broke the glass with a posthole digger, got a shotgun from the attic and a duffel bag full of birdshot from the garage, and came out the front door. Patsy Wells. Ashley's grandmother, had come to the door to talk to Fears but started back to her house next door when nobody answered. As Fears left the house, he pointed the shotgun at Greg Caughman, across the street, and shot him. Greg's two-year-old daughter, Bethany, was also hit by pellets from that shot. Fears shot Patsy Wells at least once in the chest (she had other pellet injuries which could have been from the same shot or a different shot). Patsy fell to her knees. Her husband, Elvie Wells, came into the yard, and Patsy said, "He shot me", then fell. Elvie could not see Fears, who was behind a garage partition. Elvie saw the shotgun barrel, and Fears shot him twice. After he fell, Elvie heard Fears say, "I bet you don't get up now." Ashley heard it as, "Who wants to get up now." Elvie and Ashley heard Fears mumbling something they could not understand, which sounded rehearsed. Two witnesses saw Fears's tailgate up when he left. Nobody remembered seeing Fears wear a coat, though one witness thought he had a long shirt on that covered the gun. Patsy Wells died of the gunshot injuries to her chest. Elvie Wells and Greg and Bethany Caughman survived their injuries.

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[1] The trial court sustained Fears's demurrer to the evidence on Count XVIII, Drive By Shooting.

Fears left the neighborhood quickly and got on U.S. 64, going through Sallisaw. He pulled into the Sallisaw Pontiac/Buick/GMC dealership. Fears left his truck, wearing an open long dark shirt or jacket which covered the gun, and walked in the lot to where Jimmy Nunn was showing Rita Spangler a truck. Fears shot Spangler in the head at close range, and she fell underneath the truck. He shot Nunn across the chest and, as Nunn ran, in the back. Nunn hid. He heard Fears get in his truck and saw him pull out of the dealership onto Highway 64, checking for traffic first. Nunn testified that the tailgate on Fears's truck was tilted at a 45% angle and it was difficult to see the license plate. Spangler died of a gunshot wound to the head. Nunn survived his injuries.

As Fears drove east on Highway 64 through Sallisaw and Muldrow, he began shooting at vehicles and people on and near the road. Several witnesses saw Fears steer with one hand while pointing the shotgun at traffic, and shooting, with the other. Michael Girdy saw Fears pointing the shotgun out the window toward Girdy's truck, but Fears did not shoot.[2] Fears shot at Amy Rogers's car, hitting the door and breaking the window but missing the driver and three passengers. Fears veered in the roadway to shoot at Darlene Pearson's car, but missed. Sharon and Ernest McMahon and Sharon's grandmother, Grace Jones, were walking on the fence line of a statuary store next to the highway. Fears again veered across the roadway, shot all three from his truck, and continued driving east. Jesse Crawford was parked at a convenience store on the highway. He saw Fears drive by, heard four shots, and saw his car was hit. Fears shot Randy Harris's truck, grazing the hood, and shot Steve Strick's pick-up, but missed both men. He shot at Matthew Tabor's truck, blew out both windows, and hit Tabor in the arm and chest. Fears hit Morris Herring's car, but missed Herring and his wife. In

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[2] The trial court sustained the demurrer to the evidence as to Count XVIII, drive by shooting, with reference to Mr. Girdy.

Muldrow, Melinda Dutton took her baby and five-year-old girls for a walk beside the road. As she heard police sirens behind her, Fears shot her, hitting her scalp, chest, stomach, leg, arms and hands. Neither child was injured, though pellets were found in the baby's bottle. As police pursuit caught up with Fears, Muldrow Police Officer Peters tried to intercept him. Fears shot Peters's car as he drove past, and shot five times out his back window at Peters's car as Peters followed him through Muldrow. Steve Gholston was driving on the highway when Deputy Sheriff Coleman stopped him. Gholston pulled off the road and began stopping traffic, and watched as Fears shot his truck.

Fears continued driving on Highway 64, pursued by Peters, Coleman, and other officers, until he lost control of his truck near Roland. Fears immediately threw the gun and a bag out of the passenger window. He got out of the driver's side, moved to the back of the truck, and either went down on the ground (Officer Peters) or was taken down by officers (Deputy Coleman). Fears was bleeding from a cut on his head. Fears asked Coleman whether he "was taking me where I was going." Fears told Peters he was glad Peters was there to help him. Fears told Trooper Sharp that aliens were controlling him and his brain. Several officers remarked on Fears's unemotional demeanor, and testified that he mumbled or said things they could not understand. Sharp and Lyons testified that some of Fears's actions after arrest were not normal, and were consistent with mental illness. At the hospital Fears said he deserved the death penalty. Fears was later diagnosed with severe schizophrenia. He admitted the crimes but claimed he could not distinguish right from wrong at the time of the shootings, and pleaded not guilty by reason of insanity.

We first address Fears's claim in Proposition IV that the trial court erred in failing to instruct the jury on the consequences of a verdict of not guilty by reason of insanity. Fears admits that this Court held in *Ullery v. State* that trial courts are not required to instruct jurors regarding the consequences of a verdict of not guilty by reason of insanity.[3] He urges this Court to revisit that conclusion and we agree that we should. The state of the law, the will of the Legislature regarding truth in jury instruction and in sentencing, and the circumstances of this case combine to compel a change of the law in this area.

Fears was charged with eighteen counts of murder, shooting with intent to kill, and drive-by shooting. He admitted the crimes but pleaded insanity. As defense counsel recognized from the start, this would be a difficult decision for any jury. The trial court denied counsel's pretrial request to instruct jurors on the consequences of a not guilty by reason of insanity verdict. In voir dire, after receiving pledges that a juror could, in the abstract, consider the insanity defense, counsel would ask whether jurors could consider that defense eighteen times. In discussing the burden of proof and consequences of an insanity verdict, prospective juror Childers asked, in open court, whether a verdict of innocent by reason of insanity meant the defendant was innocent. [Tr. I at 122] The parties immediately held a bench conference. Because the question was asked in open court, the entire panel was tainted. As the trial court noted, "the question that's in everyone's mind is what happens when you find him guilty by reason of insanity." [Tr. I at 122] Fears again requested the jury be instructed on the law. While unwilling to instruct jurors on the statutory procedure which the law requires for such verdicts, the trial court recognized that "[w]e've got to answer that question now." [*Id.*] The trial court instructed the prospective juror, and the entire venire, that case law and Oklahoma's high court would not allow him to address that issue. The trial court explained, "There is an entirely different process that does occur. I will tell you that. But to advise you as to that process, it is not proper in this proceeding." [Tr. I at 124-25] In response to further voir dire questioning, Childers said, "even if I found that I felt he was insane, if that meant that there was no mental hospital, no nothing, I can't - I don't feel like I would be - feel free to give that verdict." [Tr. I at 125] She then stated she could follow the law.[4] With the trial court's permission, counsel referred back to Ms. Childers's comments in closing argument. Counsel noted that the trial court had told jurors there was a separate process distinct from the criminal proceeding that occurred in the event of a finding of not guilty by reason of insanity, and jurors would have to trust that. [Tr. VII at 945]

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[3] 1999 OK CR 36, 988 P.2d 332, 346.

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[4] Another prospective juror, Ms. Barr, said on her questionnaire that she believed there should be some consequences for a legitimate plea of insanity. During voir dire, she said she could leave that belief out of the equation when considering the insanity defense. [Tr. II at 231]

The consequences of a verdict of not guilty by reason of insanity in Oklahoma are well settled. The court "shall thereupon order the defendant committed to the state hospital for the mentally ill, or other state institution provided for the care and treatment of cases such as the one before the court, until the sanity and soundness of mind of the defendant be judicially determined, and such person be discharged from the institution according to law.[5]

The statutory language regarding the commitment procedure is mandatory, ensuring that the same procedure is followed in each case. When a defendant is acquitted of a crime on the grounds that he was insane at the time the crime was committed, he *shall not* be discharged from custody until the court determines that he is not presently dangerous to the public peace and safety, where the danger is due to the person's requiring treatment under Oklahoma's mental health laws.[6] Upon acquittal, the court *shall* order the defendant confined to a particular state hospital for the mentally ill, the sheriff shall deliver the defendant, and he must remain confined for no less than thirty (30) days.[7] Within forty-five days of the initial confinement, the court must hold a hearing on the defendant's status; both parties may be represented by counsel and may present evidence.[8] The trial court may hold more than one hearing. To assist the court in making its determination, within thirty-five days of confinement the defendant must be examined by two qualified psychiatrists or psychologists, who shall present the court, the district attorney and defense counsel with individual reports on the defendant's psychiatric findings and an evaluation of the defendant's present danger to the public.[9] If necessary, the court may order a third examination.[10] At the hearing, the district attorney must establish by a preponderance of the evidence (a) whether the defendant is presently dangerous to public peace or safety because he is a person requiring mental health treatment; or (b) if not, whether the defendant needs continued supervision as a result of unresolved symptoms of mental illness or a history of treatment noncompliance.[11] If the court answers "no" to both questions, the person must be discharged immediately.[12] If the court finds the person is a present danger to the public, he shall be committed to the custody of Department of Mental Health and Substance Abuse Services.[13] If the court finds the person is not a danger, but needs continued supervision, the court may discharge him, commence involuntary civil commitment, or order conditional release.[14] In essence, the procedure mandates a court proceeding, plus mental health evaluation and treatment, to ensure that mentally ill and dangerous people are confined in a secure state-supervised setting.

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[5] 22 O.S.2001, § 924.

[6] 22 O.S.2001, § 1161(A)(2) (emphasis added).

[7] 22 O.S.2001, § 1161(B)(1) (emphasis added).

[8] 22 O.S.2001, § 1161(B)(2).

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[9] 22 O.S.2001, § 1161(C)(1).

[10] 22 O.S.2001, §§ 1161(C)(2), (C)(3)(b).

[11] 22 O.S.2001, § 1161(C)(3)(a).

[12] 22 O.S.2001, §§ 1161(D)(1).

[13] 22 O.S.2001, §§ 1161(D)(2).

The State relies on our opinion in *Ullery* to argue that trial courts are not required to instruct jurors on the law. However, shortly after *Ullery* was decided, the Legislature passed "truth in sentencing" legislation. An important goal of the truth in sentencing laws is to give jurors accurate information about sentencing. Where a statute mandates a sentence or procedure which will have a direct effect on a sentence, jurors should know what that law is. Accurate instruction on the law allows jurors in Oklahoma to confidently render a verdict and impose a sentence free of speculation.[15] As I noted in *Ullery*, "There is no guesswork involved in Oklahoma's law mandating commitment. The trial court and both parties knew exactly what would happen to Ullery under the statute."[16] This Court has recognized that a better informed jury may better perform its functions.[17] We have encouraged trial courts, to the extent the law permits, to answer juror's questions using clear and plain language.[18] Prospective juror Childers raised a question before the whole venire, which could have been answered by reference to existing statutory law.

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[14] 22 O.S.2001, §§ 1161(E).

[15] *Anderson v. State*, No. F-2004-882, slip op. at 8.

[16] *Ullery*, 988 P.2d at 346 n. 39.

[17] *Littlejohn v. State*, 2004 OK CR 6, 85 P.3d 287, 293; *Cohee v. State*, 1997 OK CR 30, 942 P.2d 211, 212.

In *Ullery*, we relied on previous cases which characterized the statutory procedures as "merely a procedural statement of disposition subsequent to the verdict and [are] immaterial to the process of rendering a verdict concerning the sanity of the accused."[19] We noted that the United States Supreme Court had earlier held in *Shannon v. United States* that this instruction is not required under federal law.[20] However, Shannon was based in large part on the principle, particularly applicable in the federal system, that juries are to render a verdict of guilt or innocence without regard to the consequences of their verdict, since the jury has no sentencing function; the jury's job is to find guilt but the judge's job is to impose the sentence.[21] The Court commented that providing jurors with information about sentencing "invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion."[22]

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[18] *Littlejohn*, 85 P.3d at 283; *Cohee*, 942 P.2d at 215.

[19] *Ullery*, 988 P.2d at 346, quoting *Ellis v. State*, 1992 OK CR 45, 867 P.2d 1289, 1298 and cases cited therein.

[20] 512 U.S. 573, 575, 114 S.Ct. 2419, 2422, 129 L.Ed.2d 459 (1994).

[21] 512 U.S. at 579, 114 S.Ct. at 2424.

[22] *Id.* The Court also took notice of the fact that the statute creating the federal commitment procedures in these cases did not

Oklahoma jurors are in a completely different position. Their duties include both finding guilt or innocence and recommending punishment. Oklahoma defendants have a statutory right to have jurors determine punishment.[23] Thus Oklahoma jurors are explicitly required to consider the consequences of their verdict, as jurors themselves determine those consequences. In most cases, there is no confusion or misunderstanding surrounding the consequences of a guilty verdict – jurors may impose a term of imprisonment for a specific number of years, or impose a fine, or both, depending on the statutory range of sentence for that particular crime. In circumstances where confusion may arise, this Court has held that jurors should be accurately informed regarding the law. It is not error, and is the better practice, to tell jurors the meaning of the possible sentence of life without parole.[24] In appropriate cases, trial courts must instruct juries on the statute mandating that defendants serve 85% of their sentences for certain enumerated crimes (the 85% Rule).[25] In fact, the State argues that this case use the same reasoning as it has in the 85% Rule, as the issues are "akin" and "the same rationale applies". [Appellee's Brief at 26] We agree.

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specifically require jurors to be instructed on the procedures. Of course, Oklahoma criminal statutes do not generally contain such provisions; the Oklahoma Court of Criminal Appeals promulgates uniform jury instructions for use in criminal cases.

[23] 22 O.S.2001, § 926.1.

[24] *Littlejohn*, 85 P.3d at 293-94.

[25] *Anderson v. State*, No. F-2004-882, slip op. at 17.

Before and since *Ullery*, several other states have considered this question. Twenty-five states now require jury instruction on the consequences of a verdict of not guilty by reason of insanity.[26] Eleven

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[26] *Schade v. State*, 512 P.2d 907, 918 (1973) (no jury sentencing, but jury must be instructed on consequences of verdict upon defendant or jury request); *People v. Moore*, 166 Cal.App.3d 540, 211 Cal.Rptr. 856 (Cal.App. 2 Dist. 1985) (no jury sentencing, but instruction given upon defendant or jury request); *People v. Thomson*, 591 P.2d 1031, 1032 (Colo. 1979) (defendant entitled upon defendant or jury request to jury instruction on commitment procedures); *State v. Wood*, 208 Conn. 125, 545 A.2d 1026, 1035-36 (1988) (statute requires jury instruction on consequences of verdict, but no error in non-jury sentencing state where, after required instruction, trial court also instructs jurors to base decision on the evidence rather than the consequences of verdict); *Lyles v. United States*, 254 F.2d 725, 728 (D.C.Cir. 1957) (no jury sentencing, but defendant entitled to instruction because risk of jury confusion); *Roberts v. State*, 335 So.2d 285, 289 (Fla. 1976) (after *Lyles*, non-sentencing jury should be instructed on consequences of verdict, particularly since jurors are instructed about possibility of probation and parole for guilty verdict); *Spraggins v. State*, 258 Ga. 32, 364 S.E.2d 861, 863 (1988) (error to fail to instruct jurors as mandated by statute, since "the purpose of OCGA § 17-7- 131(b)(3)(B) is to ensure that the jury understands that a verdict of guilty but mentally ill does not mean that the defendant will be released." Court noted that prosecutor's argument, that jury could find defendant guilty but not want to punish, contributed to reversible error); *State v. Amorin*, 58 Haw. 623, 574 P.2d 895, 898-99 (1978) (statute requires instruction on consequences in non-jury sentencing state as a matter of information for jury, no error where trial court modified instruction to tell jury that consequences should not influence decision); *Georgopulos v. State*, 735 N.E.2d 1138, 1143 (Ind. 2000) (adopting procedure requiring trial courts to give appropriate instruction on consequences of verdict); *State v. Hamilton*, 216

Kan. 559, 534 P.2d 226, 230-31 (1975) (statute requires instruction on substance of commitment procedure; trial court did not err in instructing over defendant's objection, but instruction which incorporated statutory procedures was too detailed and potentially confusing); *State v. Babin*, 319 So.2d 367 (La. 1975) (on rehearing) (jury instructed upon defendant or jury request, particularly in light of statute requiring generally that when defendant pleads insanity the jury shall be instructed "with respect to the law applicable thereto"); *Erdman v. State*, 315 Md. 46, 553 A.2d 244, 250 (1989) (jury should be instructed on consequences of verdict at defendant's request); *Commonwealth v. Mutina*, 366 Mass. 810, 323 N.E.2d 294, 301-02 (1975) (no jury sentencing, but jury must be instructed on consequences of verdict upon defendant or jury request); *People v. Cole*, 382 Mich. 695, 172 N.W.2d 354, 366 (1969) (no jury sentencing, but instruction *should* be given, after *Lyles*), extended to *sua sponte* instructions in *People v. Rone*, 109 Mich.App. 702, 311 N.W.2d 835, 839 (1981); *Hill v. State*, 339 So.2d 1382, 1386 (Miss. 1976) (statute provides that "if the jury certify that such person is still insane and dangerous the judge shall order him to be conveyed to and confined in one of the state asylums for the insane." [Miss. Ann. § 99-13-7]; jurors should be instructed on statutory directions); *State v. Pike*, 516 S.W.2d 505, 507 (Mo.App. 1974) (error not to instruct on consequences, at defendant's request, as required by statute); *Kuk v. State* 80 Nev. 291, 392 P.2d 630, 634 (1964), extended in *Bean v. State* 81 Nev. 25, 398 P.2d 251 (1965) (error to fail to give the instruction when requested, but error was harmless where counsel's summation accurately told the jury what the consequences were); *State v. Krol* 68 N.J. 236, 344 A.2d 289, 304-05 (1975) (invalidating commitment statute and setting forth constitutional provisions for commitment procedures after verdict of not guilty by reason of insanity, court held that jurors must be instructed on consequences of verdict); *Novosel v. Helgemoe*, 118 N.H. 115, 384 A.2d 124, 125 (1978) (jury must be instructed on consequences of verdict); *State v. Hammonds* 290 N.C. 1, 224 S.E.2d 595, 604 (1976) (upon defendant or jury request states require the instruction by statute.[27] In most of

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a trial court must instructed jury on consequences of verdict); *State v. Amini*, 175 Or.App. 370, 28 P.3d 1204, 1214 (Or.App. 2001) (no error to instruct jury on consequences of verdict, as mandated by statute, over defendant's objection); *Commonwealth v. Mulgrew*, 475 Pa. 27 1, 380 A.2d 349 (1977) (no jury sentencing, but jury must be instructed on consequences of verdict); *Matlock v. State*, 566 S.W.2d 892, 895 (Tenn.Crim. 1978) (although statute requires instruction in proper case, no error in failure to instruct where no evidence presented that defendant was insane at the time of the crime); *State v. Shickles*, 760 P.2d 291, 298 (Utah 1988), *abrogated on other grounds State v. Doporto*, 935 P.2d 484, 308 (Utah 1997) (no jury sentencing, but defendant entitled to instruction because risk jurors will not consider insanity verdict); *State v. Nuckolls*, 273 S.E.2d 87, 90 (W.Va.1980) (defendant entitled to argument and instruction on consequences of verdict, explicitly overruling previous case law otherwise). *See also State v. Shoffner*, 31 Wis.2d 412, 143 N.W.2d 458, 465-66 (1966) (no jury sentencing, although normally no instruction on consequences of verdict, exception justified due to danger that juries, believing insane defendant will be freed, may be biased against insanity verdict; court "prefer" that instruction be given, though no find error in failure to give). Wisconsin subsequently enacted a statute requiring instruction on the consequences of a verdict of not guilty by reason of insanity.

[27] Conn. Gen. Stat. Ann. § 54-89a (requires instruction on the consequences of verdict absent defendant's affirmative objection); Georgia Code Ann. § 17-7- 131(b)(3) (requires jury instruction that on verdict, "the defendant will be given over to the Department of Corrections or the Department of Human Resources, as the mental condition of the defendant may warrant."); Hawaii Rev. Stat. § 704-402(2) (jury shall be instructed on consequences at defendant's request); Kan. Stat. Ann. § 22-3423 (in any case where insanity defense is raised "the court shall instruct the jury on the substance" of statute setting

these jurisdictions, juries do not impose sentence.[28]

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forth commitment procedure); Louisiana Stat. Ann. C.Cr.P. Art. 803 (when defendant pleads insanity, court shall instruct jurors with respect to the law applicable thereto – interpreted to include consequences of verdict, commitment process); Miss. Ann. § 99-13-7 ("if the jury certify that such person is still insane and dangerous the judge shall order him to be conveyed to and confined in one of the state asylums for the insane."]; Mo.Rev.Stat. (Vernon) § 552.030(7) (jury must be instructed on consequences at defendant's request); N.Y. C.P.L. § 300.10 (McKinney's 2002) ("Where a defendant has raised the affirmative defense of lack of criminal responsibility by reason of mental disease or defect, as defined in section 40.15 of the penal law, the court must, without elaboration, instruct the jury as follows: 'A jury during its deliberations must never consider or speculate concerning matters relating to the consequences of its verdict. However, because of the lack of common knowledge regarding the consequences of a verdict of not responsible by reason of mental disease or defect, I charge you that if this verdict is rendered by you there will be hearings as to the defendant's present mental condition and, where appropriate, involuntary commitment proceedings."); Or. Rev. Stat. Ann. § 161.313 ("When the issue of insanity under ORS 161.295 is submitted to be determined by a jury in the trial court, the court shall instruct the jury in accordance with ORS 161.327."); Tenn. Code Ann. (1984) § 33-7-303(e) (requires instruction where defense is raised "as to the provisions of this section" setting forth commitment procedures); Wisc. Stat. Ann. § 971.165(2) requires instruction on consequences of verdict, enacted after Shoffner).

[28] A minority of states have jury sentencing. On the whole the jurisdictions refusing instruction on the consequences of a verdict of not guilty by reason of insanity do not have jury sentencing, and base their holdings on the principle that jurors should not be told about the effect of their verdicts, as the information might confuse or hinder their fact-finding duties. The Supreme Court of

However, these courts have determined that knowledge of the consequences of the verdict may influence a jury's ability to reach that verdict. The decisions reflect a common recognition that, although jurors commonly understand the consequences of a guilty or not guilty verdict, "a verdict of not guilty by reason of insanity has no such commonly understood meaning. . . . It means neither freedom nor punishment."[29] "[T]he postverdict status of one acquitted on the grounds of insanity is not 'punishment' in the true sense or usage of that word."[30] "[I]nstructions as to a sentence following a guilty verdict concern only the length of a defendant's

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Maryland, comparing the case law permitting and forbidding the instruction, noted that the instruction was generally permitted in states which mandated commitment proceedings upon a verdict of not guilty by reason of insanity and ensured that a defendant would not be released while he posed a danger to the public (such as Oklahoma) and was generally prohibited in states where commitment was not mandatory. The Court concluded, "So, the weight of authority is not to be ascertained simply by the number of jurisdictions which require or permit the instruction as against the number of jurisdictions which preclude it. The decision in a particular jurisdiction must be viewed in the context of the status of the law with regard to commitment in that jurisdiction. [citation omitted] When the cases are examined in that light, a clear majority of the jurisdictions which have mandated commitment require or permit the instruction." *Erdman*, 553 A.2d at 247.

[29] *Lyles v. United States*, 254 F.2d 725, 728 (D.C.Cir. 1957). This opinion was co-authored by Judge Burger, the future Chief Justice of the United States Supreme Court.

[30] *People v. Cole*, 382 Mich. 695, 172 N.W.2d 354, 365 (1969).

incarceration whereas possible confusion in a juror's mind as to the ramifications of a verdict of not guilty by reason of insanity pertains to the very nature of the defendant's disposition - whether or not he will be detained and the circumstances of the detention."[31] "Not to inform the jury of these possible consequences. . . invites unnecessary speculation into their deliberations. Assuredly, the jurors will discuss this phase of a case in which a plea of insanity has been entered, and such discussion without the benefit of correct instruction may very well cause them to proceed on an erroneous basis.[32]

As discussed above, Oklahoma requires jurors to impose sentence, and accurate information about sentencing consequences is important to the jury's determination. We have held that it is the duty of trial courts to instruct jurors on the applicable law, even where defendants wish to waive such instruction.[33] Applying that principle to this issue, the Michigan Supreme Court has said, "Basic to the function of a trial court is its duty to instruct a jury on all elements of a charged crime, whether requested by the parties or not. . . . Central to this requirement is the necessity that instructions make understandable to a jury the legal concepts they are to apply.[34] Holding that juries should be instructed on the consequences of a not guilty by reason of insanity verdict, even where jurors had no sentencing responsibilities, that Court noted:

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[31] *People v. Moore*, 166 Cal.App.3d 540, 211 Cal.Rptr. 856, 864 (Cal.App. 2 Dist. 1985)

[32] *Commonwealth v. Mutina*, 366 Mass. 810, 323 N.E.2d 294, 301 (1975).

[33] *McHam v. State*, 2005 OK CR 38, ¶ 20, 126 P.662.

> This appeal makes it mandatory that this Court choose between: 1) the possible miscarriage of justice by imprisoning a defendant who should be hospitalized, due to refusal to so advise the jury; and 2) the possible "invitation to the jury" to forget their oath to render a true verdict according to the evidence by advising them of the consequence of a verdict of not guilty by reason of insanity.[35]

Oklahoma law requires no such choice. Put in these terms, this Court must decide between (1) a possible miscarriage of justice by imprisoning a defendant who should be hospitalized because the jury was not instructed on the law governing the case, and (2) continued adherence to case law which reflects neither the will of the Legislature as expressed by statute, nor the reality of jury decision-making.

Fears's situation is extraordinarily similar to one considered by the Massachusetts Supreme Judicial Court, finding that a jury faced with a mentally ill defendant who was dangerous and likely to remain so, and which desired to protect the public, was likely to refuse an insanity verdict without any information on the consequences of that verdict.

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[34] *Cole*, 172 N.W.2d at 366.

[35] *Cole*, 172 N.W.2d at 366.

> Implicit in the jury's guilty verdict was a determination that the Commonwealth had proven the defendant's sanity beyond a reasonable doubt. On the record before us, we have found no rational justification or basis for such a finding, except the jury's understandable concern for the need to confine an insane and still dangerous killer for the protection of society. The jury, lacking knowledge of the commitment necessarily flowing from a verdict of not guilty by reason of insanity, applied their own standards of justice in arriving at a verdict designed to ensure the confinement of the defendant for his own safety and that of the community.[36]

At a young age, Fears committed a series of horrible crimes. The evidence showed that, although his behavior could improve with medication, he would not be cured of the schizophrenia which prompted his criminal actions. Particularly given the prosecution's emphasis on the gruesome and overwhelming nature of the crimes, it is impossible to conclude that Fears's jurors did not take the possibility of continued danger to the public into account when considering Fears's plea of insanity.

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[36] *Mutina,* 323 N.E.2d at 301-02. *See also Krol*, 344 A.2d at 304-05, where the New Jersey Supreme Court noted: The purpose of the instruction is to inform the jurors that if they find the defendant insane, and acquit, he will not walk out of the courtroom a free man, but will be confined for medical treatment. A verdict of not guilty by reason of insanity means neither freedom nor punishment. It does mean that the accused will be confined in a hospital for the mentally ill until he has recovered his sanity and will not, in the reasonable future, be dangerous to himself or others. [Citation omitted] We think that the jury should know the consequences of such a verdict."

Fears requested several instructions on this issue. Before trial, Fears proposed an instruction modeled on a uniform California jury instruction:[37]

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[37] The full California jury instruction is: CALJIC 4.01. Effect Of Verdict Of Not Guilty By Reason Of Insanity. A verdict of "not guilty by reason of insanity" does not mean the defendant will be released from custody. Instead, [he] [she] will remain in confinement while the courts determine whether [he] [she] has fully recovered [his] [her] sanity. If [he] [she] has not, [he] [she] will be placed in a hospital for the mentally disordered or other facility, or in outpatient treatment, depending upon the seriousness of [his] [her] present mental illness. Moreover, [he] [she] cannot be removed from that placement unless and until the court determines and finds the defendant's sanity has been fully restored, in accordance with the law of California, or until the defendant has been confined for a period equal to the maximum period of imprisonment which could have been imposed had [he] [she] been found guilty. So that you will have no misunderstandings relating to a verdict of not guilty by reason of insanity, you have been informed as to the general scheme of our mental health laws relating to a defendant, insane at the time of [his] [her] crimes. What happens to the defendant under these laws is not to be considered by you in determining whether the defendant was sane or insane at the time [he] [she] committed [his] [her] crime[s]. Do not speculate as to if, or when, the defendant will be found sane. You are not to decide whether the defendant is now sane. You are to decide only whether the defendant was sane at the time [he] [she] committed [his] [her]

> You are not to decide whether the defendant is now sane. You are to decide only whether the defendant was sane at the time he committed the crimes charged. If upon consideration of the evidence you believe the defendant was insane at the time he committed the crimes charged, you must assume that those officials charged with the operation of our mental health system will perform their duty in a correct and responsible manner, and they will not release this defendant unless he can be safely returned to society.[38]

Fears proposed a second instruction:

> A verdict of not guilty by reason of insanity does not mean the defendant will be released from custody. Instead he will remain in confinement in a hospital for the mentally ill until the superintendent of such hospital certifies, and the court is satisfied, that such person has recovered his sanity and will not in the

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crime[s]. If upon consideration of the evidence, you believe defendant was insane at the time [he] [she] committed [his] [her] crime[s], you must assume that those officials charged with the operation of our mental health system will perform their duty in a correct and responsible manner, and that they will not release this defendant unless [he] [she] can be safely returned into society. It is a violation of your duty as jurors if you find the defendant sane at the time [he] [she] committed [his] [her] offense[s] because of a doubt that the Department of Mental Health or the courts will properly carry out their responsibilities.

[38] O.R. p. 137, Defendant's Requested Instruction No. 14.

> reasonable future be dangerous to himself of others.[39]

Finally, Fears proposed this supplemental instruction in lieu of the first two, based on the trial court's oral instruction during *voir dire:* "If a verdict of not guilty by reason of insanity is reached, another process separate and apart from these criminal proceedings will take place. You are not to consider that process or those matters in reaching the verdict herein. That process is the court's responsibility."[40]

Any of Fears's proposed instructions would have captured the spirit, if not the letter, of Oklahoma's procedures for involuntary confinement of persons found not guilty by reason of insanity.[41] We agree with the Kansas Supreme Court that a trial court should not instruct on the commitment details provided by statute, which could prove unnecessarily confusing for jurors.[42] That Court, interpreting a mandate to instruct on the statutory procedures, stated, "We cannot presume a legislative intent that all the statutory details be incorporated in an instruction to the jury. . . . It is our opinion the legislature intended only that the jury be apprised that the defendant, if found not guilty because of insanity, would be committed to the state security hospital for safekeeping and treatment until granted discharge or convalescent leave as provided by law. This seems to us to be the substance of the statute and we believe an instruction to such effect will fulfill the spirit of the law."[43] Other jurisdictions which have promulgated such instructions have included a clear statement of the outline of the applicable law, using plain language.[44] This Court now does the same.

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[39] O.R. p. 138, Defendant's Requested Instruction No. 15.

[40] O.R. p. 163.

[41] 22 O.S.2001, § 1161(A)(2).

[42] *Hamilton,* 534 P.2d at 231, citing *Lyles*, 254 F.2d 725, 728.

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[43] *Id.*

[44] Georgia statutes require an instruction that upon a verdict of not guilty by reason of insanity, "the defendant will be given over to the Department of Corrections or the Department of Human Resources, as the mental condition of the defendant may warrant." Georgia Code Ann. § 17-7-131(b)(3) The Maryland Supreme Court approved of this instruction: "If the defendant is found not criminally responsible, the court will commit the defendant to the Department of Health and Mental Hygiene for institutional inpatient care. In the future, the defendant will be entitled to release from custody of the Department of Health and Mental Hygiene only if this court or a jury finds he will not be a danger to himself or the person or property of another." *Erdman,* 315 Md. 46, 553 A.2d at 246. Mississippi statutes require instruction that "if the jury certify that such person is still insane and dangerous the judge shall order him to be conveyed to and confined in one of the state asylums for the insane." Miss. Ann. § 99-13-7. The Nevada Supreme Court held it was not error to instruct: "The purpose of the instruction is to inform the jurors that if they find the defendant insane, and acquit, he will not walk out of the courtroom a free man, but will be confined for medical treatment. A verdict of not guilty by reason of insanity means neither freedom nor punishment. It does mean that the accused will be confined in a hospital for the mentally ill until he has recovered his sanity and will not, in the reasonable future, be dangerous to himself or others." *Kuk*, 392 P.2d at 634. New York

Law, logic, fundamental fairness and common sense require that juries be told the consequences of their verdict, not guilty by reason of insanity. Fears's jury should have been so instructed. This proposition is granted.

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statutes require this instruction: "A jury during its deliberations must never consider or speculate concerning matters relating to the consequences of its verdict. However, because of the lack of common knowledge regarding the consequences of a verdict of not responsible by reason of mental disease or defect, I charge you that if this verdict is rendered by you there will be hearings as to the defendant's present mental condition and, where appropriate, involuntary commitment proceedings." N.Y. C.P.L. § 300.10 (McKinney's 2002) *But see Georgopulos,* 735 N.E.2d at, 1143, in which the Indiana Supreme Court proposed the following instructions: "Whenever a defendant is found guilty but mentally ill at the time of the crime, the court shall sentence the defendant in the same manner as a defendant found guilty of the offense. At the Department of Correction, the defendant found guilty but mentally ill shall be further evaluated and treated as is psychiatrically indicated for his illness;" and "Whenever a defendant is found not responsible by reason of insanity at the time of the crime, the prosecuting attorney shall file a written petition for mental health commitment with the court. The court shall hold a mental health commitment hearing at the earliest opportunity after the finding of not responsible by reason of insanity at the time of the crime, and the defendant shall be detained in custody until the completion of the hearing. If, upon the completion of the hearing, the court finds that the defendant is mentally ill and either dangerous or gravely disabled, then the court may order the defendant to be committed to an appropriate facility, or enter an outpatient treatment program of not more than ninety (90) days".

We now turn to Fears's claims of prosecutorial misconduct. In Proposition I Fears claims that prosecutors engaged in systematic misconduct throughout argument which was unduly prejudicial. Fears objected to several of these comments, and some objections were upheld. Normally this would cure any error as to those comments, unless the comments are unusually egregious and so prejudicial that they would undoubtedly taint the verdict.[45] We review the comments without objection for plain error. Parties have the right to freely argue both the evidence presented and reasonable inferences from the evidence.[46] Errors in argument will only require relief where grossly improper and unwarranted argument affects the defendant's rights.[47] A thorough review of the record here shows that the pervasive misconduct, combined with the paucity of evidence supporting Fears's sanity (see Proposition V), were both egregious and prejudicial, and improperly encouraged jurors to reach a verdict based on sympathy and emotion rather than the evidence presented. The cumulative effect of the improper argument deprived Fears of a fair trial and a fair sentencing proceeding.[48]

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[45] *DeRosa v. State*, 2004 OK CR 19, 89 P.3d 1124, 1144, *cert. denied*, 543 U.S. 1063, 125 S.Ct. 889, 160 L.Ed.2d 793 (2005); *Harris v. State*, 2000 OK CR 20, 13 P.3d 489, 500; *Ybarra v. State*, 1987 OK CR 31, 733 P.2d 1342, 1347.

[46] *Hanson v. State*, 2003 OK CR 12, 72 P.3d 40, 49.

[47] *Hanson*, 72 P.3d at 49; *Childress v. State*, 2000 OK CR 10, 1 P.3d 1006, 1013.

In closing, Fears emphasized his mental illness and evidence of insanity. Fears complains about the prosecutor's rebuttal argument. Fears objected unsuccessfully to argument that counsel did not question many of the State's witnesses because he didn't want to hear the facts. This is not a reasonable inference from the evidence; the witnesses testified to the facts of the attacks in great detail, and counsel did not question them further because those facts were not contested. The prosecutor stated that Fears's defense was merely "psycho-babble." Contrary to the State's suggestion, the gist of this argument was not that defense experts were "paid a lot of money" and jurors should consider that in weighing their testimony. [Appellee's Brief at 13] The gist of the argument was that the experts (apparently including the State's own expert witness) testified to unintelligible gibberish which was intended to obscure the facts of the case.

For several months Fears had abused Coricidin, an over-the-counter cold remedy which could exacerbate hallucinations and delusions. Fears took a large dose of this medicine the night before the crimes but had not taken any on October 26. He introduced this evidence to support his claim that he was mentally ill (self-medicating and enhancing his delusions and violent fantasies), but did not claim the medication made him insane. The prosecutor argued that Fears's evidence of mental impairment by schizophrenia and his use of Corcidin were like a schizophrenia Corcidin soup, and stated, "I think it's for confusion." Despite the State's suggestion otherwise, the record shows this was, indeed, an expression of personal opinion.

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[48] *DeRosa,* 89 P.3d at 1145; *Spears v. State,* 1995 OK CR 36, 900 P.2d 431, 445.

The prosecutor said "wouldn't it be great, if there were no deceit, no lies." [Tr. VII at 967] He went on to tell jurors that Fears's defense misrepresented what happened, exaggerated his testing symptoms and hid behind experts, and that the jury could not respect those experts because they had sold their testimony. Despite the State's suggestion otherwise, this line of argument did in fact call Fears's defense a lie. This is improper.[49] In addition, the argument was not supported by the evidence. The State's own expert, paid for her testimony, stated that Fears was mentally ill and did not testify he had misrepresented his perception of what happened. Fears complains that the prosecutor called him a killer; this argument is certainly supported by the evidence and was not error.

The prosecutor made several comments about the fact that Fears's experts were paid. The State responds to all these claims of error by arguing that the arguments mentioning defense experts were all proper comments going to the witness' potential bias and motives to testify. This Court has certainly held that prosecutors may comment on the relationship between an expert's fee for services and the truth of his testimony.[50] However, these arguments went beyond that observation. Initially, the prosecutor argued that defense counsel was muddying the waters with his experts. The trial court upheld Fears's objection but did not admonish the jury. The State's suggestion that this was a comment on the "amount of money paid" [Appellee's Brief at 11] is not supported by the record; the prosecutor was arguing that defense counsel was trying to confuse jurors with expert opinion, not that the defense experts might be biased because they were paid.[51] The prosecutor repeatedly stated that Fears had bought a defense by calling expert witnesses–in fact, almost his last statement to the jury was, "I submit to you the defendant cannot buy his way out of these murders." While the trial court overruled the objection to that comment, Fears's first objection to the same comment, made earlier in argument, was upheld. This Court has never condoned a claim in argument that a defendant attempted to buy his way out of a criminal conviction,[52] and the comments were error under any standard of review. The prosecutor noted that, while defense experts were paid, the State's witnesses "paid their price in blood" and, after the defense objection was sustained, that they "paid their price in pain." Fears's objection was again sustained. This argument was only partially supported by the evidence; of course, some witnesses for the State were badly injured or described seeing Wells and Spangler die, many of the State's victim witnesses were not injured and the police and expert witness were paid for their time. In addition, this argument encouraged jurors to base their verdicts on sympathy for the victims, not (as the State suggests) to consider the evidence that the experts were paid when weighing their credibility. We have held that, while the State may argue inferences from the evidence, the guilt stage of trial is no place for even subtle appeals to sympathy for the victims.[53]

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[49] *DeRosa*, 89 P.3d at 1144; *McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1220- 21; *Stout v. State*, 1984 OK CR 94, 693 P.2d 617, 627.

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[50] *See Duckett v. State*, 1995 OK CR 61, 919 P.2d 7, 19. We recognize that *Duckett* has no precential value, but it is persuasive on this issue.

[51] This characterization is supported by other argument, discussed above, which explicitly stated that defense counsel was trying to confuse the jury and that the experts were merely mouthing "psycho-babble" which obscured the facts of the case.

[52] *See Martinez v. State*, 1999 OK CR 33, 984 P.2d 813, 826 (condemning as "clearly improper" argument that the defendant paid an expert to testify as instructed for the defense).

The trial court erred in overruling Fears's continuing objections to a particularly damaging line of argument. The prosecutor began, "Why are we here. What are we doing. We know he did it. The issue is insanity, obviously. Defendant has a right to a trial. He has a right to present his defenses. He's exercising that right to trial, and that's fine and dandy. I'm glad he is. Folks, what ever happened to people taking responsibility for their actions." [Tr. VII at 956] When Fears objected, the prosecutor said, "Previous sentence I said he had the right to trial and he's exercising it and that's great." After the objection was overruled the prosecutor continued for two more paragraphs to discuss accountability, trying to get out of the consequences of one's actions, passing the blame, and abandoning the truth. Taking the comments as a whole, the prosecutor clearly suggested that Fears should not have exercised his constitutional right to a jury trial. This right is at the very foundation of the privileges afforded every citizen of this state and country.[54] The prosecutor paid lip service to this right, while eviscerating Fears's decision to have a jury hear his case, by noting that the right existed. This Court should not condone this "magic words" tactic. The State claims this argument was not error because the prosecutor used the magic words and then contrasted the "difference between raising a legitimate insanity defense and trying to use such a defense to avoid responsibility for one's actions." [Appellee's Brief at 12] This makes no sense in light of the evidence presented. There is no question that Fears's insanity defense was legitimate; all four experts who testified agreed that Fears was seriously mentally ill, and three believed he met the legal definition for insanity. The fact that the prosecutors may not have believed, despite their own expert's opinion, that Fears was mentally ill or insane does not justify this argument.[55]

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[53] *Garrison v. State*, 2004 OK CR 35, 103 P.3d 590, 610-11; Spears, 900 P.2d at 445.

Fears correctly claims that the prosecutor gave his personal opinion about the proper outcome of the case. The prosecutor ended his argument by stating that justice required a finding of guilt and sentences of life without parole for the murders of Wells and Spangler, and maximum sentences on the remaining counts. He said that, if jurors believed Fears was insane at the time of the crimes, the State had failed and the "manipulation of the facts by the defense has prevailed." Fears's objection was sustained and the jury admonished. However, the prosecutor continued in the same vein, "[I]f he's found not guilty by reason of insanity, I submit to you justice took a very, very slap [sic] right square in the face." [Tr. VII at 970] Fears's objection was overruled. We have condemned similar arguments in previous cases.[56] The State apparently concedes the specific claim that the argument about "justice" was improper, merely suggesting the prosecutor was arguing the State's view and any error was cured when the objection was sustained and the jury admonished. The State suggests the "slap in the face" comment was "simply another way of stating that the evidence supported a guilty verdict" [Appellee's Brief at 16], without addressing the argument that it is, in fact, an improper way to make that claim.

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[54] See Okl. Const. art. 2, § 20; U.S.Const. amend. VI.

[55] The prosecutor's comments and arguments throughout trial, including pretrial matters and conversations at the bench, indicate that prosecutors rejected not only Fears's insanity defense but his claim of mental illness.

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[56] In the context of capital cases, we have warned prosecutors not to argue that the only just verdict was the death penalty, that the facts justified only the harshest possible punishment, and that the system, the victims, and justice required the most severe punishment. *Malicoat v. State*, 2000 OK CR 1, 992 P.2d 383, 402; *Le v. State*, 1997 OK CR 55, 947 P.2d 535, 555; *McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1220; *Brown v. State*, 1988 OK CR 59, 753 P.2d 908, 913. These improper statements took the form of personal opinion, and prosecutors here did not, as in some previous cases, mitigate this error by reminding jurors that punishment was up to them. *See Harris v. State*, 2004 OK CR 1, 84 P.3d 731, 753; *Lockett v. State*, 2002 OK CR 30, 53 P.3d 418, 425, *cert. denied*, 538 U.S. 982, 123 S.Ct. 1794, 155 L.Ed.2d 673 (2003).

Fears does not specifically raise this, but we are compelled to note one further very troubling instance of prosecutorial misconduct. Both prosecutors, in first and last closing, seriously misstated the law on the insanity defense. The law provides a person may be found not guilty by reason of insanity if he does not know or understand the consequences of his actions, *or* if he cannot distinguish between right and wrong at the time of the offense.[57] One prosecutor argued that jurors must find Fears had proved he did not know right from wrong, and that he did not understand the consequences of his actions. Fears did object to this misstatement and the prosecutor read the instruction verbatim, but then continued to misstate the law in argument. [Tr. VII 919, 922] The second prosecutor noted that the instruction was worded in the disjunctive, but then argued Fears's experts could not give an opinion as to both parts of the definition, and Fears could not prove he met both criteria. [Tr. VII at 952-53] Fears did not object to these statements. However, despite the fact that the jury was properly instructed on the application of the insanity defense, they rise to the level of plain error. Fears was not required to raise a reasonable doubt concerning both clauses of the definition, and he did not attempt to do so. The clear consensus among the experts was that Fears knew the consequences of his actions – that is, he knew he was shooting people and they were likely to die. Fears claimed that he could not distinguish right from wrong at the time he was shooting. Fears could never have proved the insanity defense as prosecutors defined it to the jury. In combination with the other improper argument, and given the clear weight of the evidence (see Proposition V), these misstatements of law deprived Fears of a substantial statutory right.[58]

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[57] *Ullery v. State*, 1999 OK CR 36, 988 P.2d 332, 348.

In Proposition II, Fears claims prosecutors erred in presenting a witness and witness questioning. Using the standard of review above, we find merit to the claims.

Bethany Caughman, two at the time of the crimes, was hit by some of the shotgun pellets from the shot which injured her father, Greg, as the shooting spree began. Greg, the first witness, testified that Bethany was near him when he was shot and was hit by pellets. Prosecutors initially endorsed Bethany, who was four years old by the time of trial, as a witness. However, they neither provided a witness statement for her nor included her in the list of witnesses the State expected to call at trial. Early in the trial, immediately after emotional eyewitness testimony regarding Patsy Wells's shooting and death, the State called four-year-old Bethany Caughman. As she approached the witness stand Fears objected, asking for an *in camera* hearing to determine whether she could remember and testify to events occurring when she was two. Prosecutors immediately offered to wait until later to call the witness and she left the courtroom. Fears moved for a mistrial, arguing that the only possible reason to call and display a four-year-old witness was to improperly influence the jury. The trial court denied the motion. No hearing was held, and Bethany Caughman was never called to testify.

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[58] 20 O.S.2001, 3001.1. This Court has held, in an opinion answering a certified question of law, that improper instruction on this issue ("and" vs. "or") is not reversible error where the weight of the evidence shows that no reasonable jury would have found the defendant sane if correctly instructed. *Ellis v. Ward*, 2000 OK CR 18, 13 P.3d 985, 987. That is not the case here (see Proposition V).

The record clearly supports Fears's claim of error. At the least, this was a discovery violation. Prosecutors failed to include Bethany Caughman on the State's list of trial witnesses and did not turn over a summary of her expected testimony. The State argues that Fears was not prejudiced by any discovery violation, as the girl did not testify. This neatly avoids addressing Fears's main point: that he was prejudiced when the jury saw a little girl victim, who was obviously very young at the time of the crimes, approach the witness stand. Fears claims the prosecutors never intended to have Bethany testify, but merely wished to display her to tug at jurors' heartstrings. This is a grave accusation, and one hesitates to endorse it. However, the record of the entire trial suggests this surmise is not only correct, but is the only possible reading of the situation. Throughout, prosecutors emphasized the terrible and tragic facts of this case, including the number and age ranges of the victims, the pain, shock and horror felt by the surviving victims and probably felt by the deceased, and the consequences of Fears's reprehensible actions. They introduced pictures of every victim, alive and dead, along with pictures of bloody accessories and gunshot vehicles, autopsy reports, and the deceased victims' clothing.[59] Prosecutors asked every victim witness – particularly the drive-by victims – if they had children or a family, whether or not any children or family members were present at that victim's shooting incident. Discovery orders in this case were strictly followed, but prosecutors neither included Bethany in the trial witnesses nor provided a summary of her expected testimony, as they did for every witness actually called. When Fears objected to Bethany's testimony, prosecutors immediately offered to wait to call her. The trial court didn't even have time to rule on Fears's motion for an *in camera* hearing. Prosecutors made no move to have such a hearing and never called Bethany. These actions, taken together with the prosecutor's method of presenting the case, including excesses in argument and the very personal tone often reflected in the record, support a conclusion that prosecutors used Bethany Caughman for an improper purpose.

Fears also complains correctly that prosecutors attempted to ridicule his insanity defense during their examination of witnesses. Fears told officers that the aliens controlling him had told him to kill as many people as he could, as quickly as he could. Prosecutors began during voir dire, and continued for the first few witnesses, referring to whether Fears talked about little green men or Mars. The trial court sustained some of Fears's objections and overruled some. The State admits that the prosecutor "could have more artfully posed its questions" but argues the State was merely attacking the defense theory of insanity. On the contrary, in combination with the State's closing argument and tone throughout the proceedings the record shows these comments were intended as a personal attack on the defendant and counsel, and were intended to make fun of the defense. Ordinarily any prejudice would have been cured in the instances where the objections were sustained. However, not all the objections were sustained, and prosecutors returned to the theme in closing argument. The only issue in this case was Fears's sanity. Given the extremely thin margin of evidence offered to support a finding that Fears was sane, prosecutors spent an inordinate amount of time personally attacking Fears, his witnesses, and counsel. In combination with the errors raised in Proposition I, the misconduct here casts serious doubt on the jury's finding that Fears was not insane at the time of the crimes. Error in this proposition contributes to our resolution of this case.

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[59] We do not suggest these items were inadmissible, or that their use would be inappropriate. However, their introduction, in a case where the defendant did not contest any facts regarding any of the crimes, shows the way in which prosecutors chose to focus the evidence.

Finally, we turn to Fears's claim in Proposition V that the evidence was insufficient to show that he was sane at the time of the commission of the crimes beyond a reasonable doubt. Oklahoma law provides that mentally ill persons are not capable of committing crimes "upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness."[60] This Court has interpreted this statute to require proof that mental illness so impairs a defendant's judgment that, at the time of the crimes, he was incapable of appreciating the nature and consequences of his acts or knowing right from wrong.[61] Criminal defendants in Oklahoma are presumed sane.[62] A defendant must first raise a reasonable doubt regarding his sanity; if he succeeds, the presumption ends and the State has the burden to prove the defendant is sane beyond a reasonable doubt.[63] Fears met his initial burden, to show that he could not distinguish between right and wrong at the time of the crimes, and the State was required to prove beyond a reasonable doubt that Fears did know right from wrong at the time.[64] Whether the State met this burden is a question of fact for the jury, which may disregard expert opinions entirely and find sanity from testimony of lay witnesses.[65] As the evidence supporting Fears's sanity is so sparse, we analyze the evidence both as presented and in the context of the prosecution's arguments to the jury regarding Fears's sanity.

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[60] 21 O.S.2001, § 152.

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[61] *Ullery*, 988 P.2d at 348; *Valdez v. State*, 1995 OK CR 18, 900 P.2d 363, 375.

[62] *Cheney v. State*, 1995 OK CR 72, 909 P.2d 74, 85.

[63] *Van White v. State*, 1999 OK CR 10, 990 P.2d 253, 275; *Cheney*, 909 P.2d at 85.

[64] *Cheney*, 909 P.2d at 85.

[65] *Ullery*, 988 P.2d at 349; *McGregor v. State*, 1994 OK CR 71, 885 P.2d 1366, 1376.

There was little expert disagreement. Every expert witness agreed Fears is mentally ill.[66] All four experts – including Dr. Hall, the State's forensic psychologist – testified that Fears is seriously schizophrenic and has probably been so since childhood. While Dr. Hall thought Fears had been exaggerating his symptoms on one test administered by Dr. Gelbort, she testified that he was not faking, but was seriously mentally ill. [Tr. VI at 870-71] Drs. Gelbort and Halleck used the term "crazy", one experts normally avoid like the plague. One defense expert, Dr. Gelbort, examined Fears shortly after the crimes, before he had begun taking medication. A second defense expert, Dr. Halleck, examined him shortly after he had begun treatment. The last defense expert, Dr. John Call, and the State's expert, Dr. Hall, examined him after his treatment was well under way. All the experts agreed about certain characteristics of Fears's mental illness. All agreed that, during the crimes, Fears suffered from a delusion that he was being controlled by aliens, who had instructed him to shoot and kill as many people as he could in as brief a time period as possible, and that he expected some consequence or reward from the aliens as a result. Fears initially told Drs. Halleck and Hall he had intended to kill himself, but followed the aliens' instructions instead. Fears told Drs. Halleck and Hall that he had homicidal thoughts while talking with friends the night before the crimes. He told the doctors that after that evening he felt he was transformed, and that he wanted to kill himself, but then the aliens instructed him to start killing other people. Fears told Drs. Gelbort, Halleck and Hall, as well as Trooper Sharp, that, shortly before the crimes, he asked a friend whether he wanted to join Fears on a ride to oblivion. Fears also indicated during the psychiatric interviews that he thought he was a monster.

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[66] Dr. Gelbort, for the defense, is a clinical neuropsychologist. Dr. Halleck, for the defense, is a psychiatrist specializing in schizophrenia. Dr. John Call, for the defense, is a forensic psychologist. Dr. Hall, for the State, is a forensic psychologist.

There was no expert disagreement regarding Fears's ability, as Dr. Gelbort put it, to "respect and respond to the physical laws of the world." [Tr. VI at 776] The experts agreed that a schizophrenic in the grip of a severe delusion could engage in everyday behavior. Such a person can drive, including checking for oncoming traffic; can try to avoid recognition; can know that it is dangerous for children to play in the street; and can understand that being shot may hurt. Such a person may know where he is and what time it is. He can use proper grammar, hold a job, brush his teeth and wash his hair. Evidence also showed that, in the months before the crimes, Fears had taken large quantities of Coricidin, an over-the-counter cold medication containing dextromethorphan, an hallucinogenic. Dr. Hall testified that Fears told her the drug expanded his mind, and he believed that combining Coricidin with violent images from movies enhanced his violent fantasies. [Tr. VI at 856-57] The experts, including the State's expert, agreed that Coricidin abuse could exacerbate Fears's schizophrenic symptoms, but would not itself have caused his mental illness or provided an explanation other than mental illness for the crimes.

All three defense experts concluded that Fears was unable to distinguish right from wrong at the time of the crimes, while Dr. Hall disagreed. All the experts agreed that Fears did not apply the concepts of right and wrong to his behavior at the time of the crimes. Dr Gelbort testified that right and wrong, as concepts, had no meaning to Fears during the crimes. [Tr. VI at 780] In Dr. Gelbort's opinion, Fears's subsequent conversations suggesting he knew what he had done was against the law did not mean he knew right from wrong during the crimes. [Tr. VI at 781] Dr. Halleck testified Fears was compelled to act as he did; Fears told him he had no consciousness of right and wrong during the crimes, and that the issue was the furthest thing from his mind and never occurred to him. [Tr. VI at 827, 838] Dr. Halleck also distinguished between the knowledge of right and wrong at the time of the shootings and Fears's subsequent apparent knowledge that his acts were not legal. Dr. Call testified that Fears did not know right from wrong at the time of the crimes because right and wrong did not apply to him, based on his delusion. [Tr. VI at 895-96] In Dr. Call's opinion, the fact that Fears knew his actions might result in legal consequences – such as arrest – did not mean he knew right from wrong, because his delusion that he was a superior being controlled by aliens was so great that he did not recognize right from wrong; he "could not conform his behavior to society's rules". [Tr. VI at 896-97] Fears spent more time talking to Dr. Hall, the State's expert, about good and evil than about right and wrong, and she distinguished between the two concepts. [Tr. VI at 859] Dr. Hall concluded that "he knew the difference between good and evil or right and wrong but felt he was devoid of the ability to have any feeling about that." [Tr. VI 857] She was testifying not about Fears's comments regarding the crimes, but about his feelings before the crimes occurred, as he began to believe he had no conscience. [Tr. VI at 857] Dr. Hall also testified that, after the fact and on medication, Fears told her he knew his actions were wrong in the eyes of society and the law and he understood he would have to pay the consequences for that. She went on to say that, at the time of the crimes, Fears was operating outside society's morality. [Tr. VI at 872] Drs. Gelbort and Halleck agreed that Fears had his own value system that was rigid and required him to live to a high standard – for example, not missing work or school – but that in the grip of his delusion he was not in contact with that system. Dr. Hall would not apply the concept of a value system to Fears, because she concluded that he did not live by ordinary values of right and wrong unless he chose to. [Tr. VI at 859]

No lay witness specifically testified that Fears was sane. Fears called several friends and family members who testified about his bizarre statements and actions in the months and years preceding the crime. Fears's father testified that Fears had always been withdrawn and had not fit in well, but that he had not suspected a mental illness. Fears's sister testified that she and other family members had unsuccessfully tried to discuss Fears's condition with his mother, but that his mother was afraid he might be hospitalized or put on medication if she sought medical help for him. His aunt testified that a few months before the crimes, Daniel had changed, and told her he heard voices. His aunt had spoken to Daniel's mother, who had also talked with another aunt. She testified that Mrs. Fears would not take Daniel to a doctor because she was afraid he would be medicated and she thought he might be getting better. One school friend testified Daniel told him he thought something was wrong with him and he was afraid he was going crazy. Another school friend and her mother testified about a highly peculiar incident earlier in the same year, where Fears called himself by a different name, brandished a machete, threatened others and himself and exhibited paranoia, and talked in a different accent. The friend testified that Daniel was liked in school and people thought he was intelligent, but believed he had something wrong mentally.

The State offered lay testimony from witnesses who encountered Fears in his father's neighborhood. Fears's initial encounter with the Caughmans was belligerent. Fears drove too fast into the neighborhood, almost hit a child, and told Greg Caughman twice to watch his kids. Fears mumbled as he walked away. Greg did not hear Fears say anything out of the ordinary. Jill Caughman heard most of this exchange, and testified that Fears was mumbling things she could not understand, although she could hear them, after the exchange of words with Greg. Both Greg and Jill testified that Fears did not linger as he talked with Greg, but walked purposefully to the back of his father's house, where they immediately heard the noise he made as he broke in. After Fears shot Patsy Wells, she tried to rise. Fears shot her again, and shot Elvie Wells. Ashley Hobbs, their granddaughter, heard him ask who wants to get up now. She also heard him mumbling other things she couldn't understand, but they sounded to her like something memorized, scripture or military in nature. After he was shot, Elvie Wells heard Fears say, "I bet you don't get up now."[67] He also heard Fears say something he couldn't understand, which sounded rhythmic, like something rehearsed.

The State also offered evidence from several police officers who encountered Fears after the shooting ended. When Fears wrecked his truck after the police chase, he threw out his weapon and ammunition and came out with his hands up. He was bleeding from his forehead. Officer Peters testified that Fears lay on the ground but Deputy Coleman said they had to take him down. When Deputy Coleman approached him, Fears asked if Coleman was taking him where he was going. Coleman did not hear Fears say anything else out of the ordinary. After he was handcuffed, he told Officer Peters, "I'm glad you were there to help me." [Tr. IV at 515] Agent Lyons talked with Fears at the hospital after his arrest. She was surprised to discover that he was familiar with police pursuit procedure, and testified that he was cooperative and, for the most part, coherent. However, Fears mumbled and said several things that Lyons could not understand and had a dazed look that, she testified, could have been a sign of mental illness. Several officers were struck by Fears's calm, unemotional demeanor. While he was being treated at the hospital, Fears said he deserved the death penalty.

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[67] In argument, prosecutors noted this, then said Fears went on "in a proud and boastful manner who will stand up to me now." [Tr. VII at 913] No evidence supports this statement; witnesses did not testify they heard Fears say that, and did not say Fears was either proud or boastful in his delivery.

Trooper Sharp arrested Fears and transported him to the station, and had the most substantial conversation with Fears of any witness. Sharp testified that, although Fears was cooperative and oriented as to time and place, and appeared coherent, he talked about aliens, rambled from one subject to the next, and made statements Sharp could not understand, that he thought were not normal. Fears said aliens were controlling him and messing with his brain. [Tr. V at 608] Regarding Patsy Wells's death, Fears told Sharp that he didn't want to end up like his father, though he knew he already was. He told Sharp he shot the victims at the car dealership to make it worthwhile. [Tr. V at 600] Fears also told Sharp that he was surprised his victims screamed and were not killed immediately when he shot them. In this context, he said he was going to have police kill him, but backed out because he knew it would hurt. He asked whether Sharp would have shot him in the chest and head – a "double tap" – at the end of the chase. He asked Sharp how it felt to be sitting next to him. [Tr. V at 601] Sharp agreed that Fears's withdrawn aspect and rambling conversation were consistent with his training in identifying mental illness.[68] [Tr. V at 609-10]

Prosecutors did not argue that witnesses testified Fears was sane. Rather, the State vigorously argued at trial, and on appeal, that Fears's actions, and some of his comments to officers after his arrest, showed he was sane. In so arguing, the State attempts to greatly expand the commonly understood meaning of the requirement that a defendant know right from wrong. This requirement refers to a moral compass – the understanding that some actions are morally or ethically correct according to religious or societal norms, and others are not. Prosecutors claimed Fears was sane because he knew that children should not be playing in the street, and admonished Greg Caughman to watch his kids. This is a safety issue, not a moral imperative; the experts agreed that schizophrenics in the grip of a delusion can still function effectively in the world and apply basic notions of safety. Prosecutors pointed to Fears's ability to drive and check for traffic, and his possible attempts to conceal his identity (including shooting Elvie Wells from the shadows, possibly concealing his license plate with his tailgate, and putting on his jacket to hide his shotgun) as evidence that he was sane. Of course, as the experts noted, ability to carry out these actions did not mean Fears knew right from wrong.

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[68] When discussing the circumstances of his stop and surrender, Fears wondered whether he would get "gassed". While prosecutors and the State assert that this meant Fears knew he could get the death penalty, and thus knew his actions were wrong, that is speculation. No evidence at trial suggested that is what Fears meant by this statement. The officer testified that he had heard that term in the past referring to the use of a gas chamber as punishment for a crime. However, Oklahoma has never had a gas chamber. At seventeen, Fears was highly unlikely to associate being "gassed" with a death sentence. Fears was obsessed with police procedure and talking about what police might have done when they stopped him. In context, his comment most likely referred to tear gas, pepper gas, or Mace, all gaseous substances which, in common understanding, police may use when stopping or arresting a suspect.

Prosecutors also argued Fears was sane because he surrendered, rather than be killed by police, since he knew it would hurt. Again, in context, the record shows that Fears appears to have realized being killed by police would hurt only after hearing his victims scream, rather than fall dead immediately when they were shot. This does not suggest a firm grip on reality. Prosecutors argued his surrender showed he knew what he was doing, and therefore he knew right from wrong. These things do not automatically follow. Everyone agreed that Fears knew to some extent what he was doing, both in shooting and in surrendering. However, if his original plan, carrying out the aliens' instructions, included being shot by police (as, according to testimony, it may have), then revising that plan to include surrender does not show that Fears knew his actions were wrong. It merely shows he could make and revise a plan to carry out his delusion; Drs. Gelbort, Halleck and Hall agreed this can occur as a schizophrenic acts on a delusion.

Given the meager evidence of sanity, prosecutors consistently directed the jury's attention away from the issue of knowledge of right and wrong. Prosecutors argued throughout that Fears's entire sequence of actions showed that he was not insane, because he knew what he was doing when he drove, shot, and surrendered. Whether Fears knew what he was doing as he acted does not mean that he knew that what he was doing was wrong. That was the issue in this trial, and the evidence does not support the jury's conclusion that he did. Prosecutors argued, and the State asserts on appeal, that Fears knew the consequences of his actions because his statements show he knew he was killing people. Again, this was not the issue in this trial. Fears was only required to provide proof beyond a reasonable doubt of one prong of the test for insanity. Fears never claimed he did not know the consequences of his actions. He continues to claim, on appeal as at trial, that he did not know right from wrong during the crimes. In final closing argument, the prosecutor told jurors he would discuss the evidence showing Fears knew right from wrong. Instead, he talked for six pages about how the defense was bought and paid for (see Proposition I), how Fears had lied to get out of trouble, how Fears believed he was smarter than everyone else, and how he was trying to make a name for himself. Only after that interlude, which was rife with error, did the prosecutor spend one paragraph on the evidence he said supported a finding Fears knew right from wrong: (a) knowing children should not be in the road; (b) concealing his identity and hiding; (c) fleeing the first crime scene; (d) checking for traffic as he drove and obeying traffic lane laws; (e) surrendering to police. Finally, the prosecutor argued, Fears had to know right from wrong because he shot his victims in the back of the head and the face with a shotgun, and the recognition that killing another human is wrong is "inherent in the human psyche." [Tr. VII at 966] This was precisely the issue – whether Fears's mind was capable of understanding that what he did was wrong at the time of the crimes. Rather than attempting to show by the evidence that Fears was sane, the prosecutor encouraged jurors to disregard that evidence and Fears's claim of insanity, since a normal person would know that Fears's actions were wrong.

The record, including comments, argument, and questioning throughout the trial process, reflects that the prosecutors were personally offended by Fears's plea of not guilty by reason of insanity. The tone, tenor, and words of the closing arguments reflect the prosecutors' opinion that Fears had committed terrible crimes and was trying to get out of the consequences. The prosecutors argued that Fears meant to kill himself, and only changed his mind after the encounter with Greg Caughman. It was this encounter, they argued, and not any mental disability, which made Fears angry and convinced him to go on an approximately fifteen-mile, nineteen-victim shooting spree. Looked at objectively, this simply is not supported by the record. Even Greg and Jill Caughman testified that Fears did not appear particularly angry and did not stay to fight, even after invited to do so by Greg.

Prosecutors also argued that Fears acted out of vanity, because he had always said he would go crazy and go on a shooting spree. Dr. Hall testified that Fears told her this while explaining the shooting spree. [Tr. VI at 873] However, no other witness testified that Fears in fact had ever said anything like that, and one close friend testified he had not. Fears also told Dr. Hall that, since childhood, he had had violent fantasies about killing people, including blowing up the school.

This statement was in the context of his schizophrenia. Assuming the statement was true and taking the prosecutors' argument at face value, it still does not resolve the question of sanity. If Fears planned this shooting spree in the grip of a schizophrenic delusion, the fact that he talked about it first would not conclusively prove anything about his ability to distinguish right from wrong.

Fears raised a reasonable doubt as to his sanity. Several lay witnesses testified that Fears had serious mental problems and made bizarre or unusual statements before, during and after the crimes. Only one witness testified to a completely unremarkable conversation, and that was when Fears gave his name, address, etc., at booking. Four experts said Fears was (a) seriously mentally ill; (b) acting under a severe schizophrenic delusion at the time of the crimes; and (c) unable to apply the concepts of right and wrong to his actions at the time of the crimes. One expert testified that, nevertheless, she believed Fears knew right from wrong and chose not to apply that system of morality to his actions. The State relied on this opinion, and on Fears's acts themselves and his statements, to show that he knew right from wrong. However, all the experts agreed that many of those actions had no bearing on Fears's ability to distinguish right from wrong, as they involved instead Fears's ability to function in the real world while in the grip of a delusion. Fears's statements regarding punishment are ambiguous on the issue of right or wrong; some may indicate that Fears knew what he did was wrong after the fact, and some may or may not refer to the issue at all, but none clearly show he knew his actions were wrong when he did them. Taking all the evidence in the light most favorable to the State, it is insufficient to show beyond a reasonable doubt that Fears was sane. This proposition should be granted and the case remanded for entry of a not guilty by reason of insanity verdict.

Fears does not formally include a Proposition VI. However, in his conclusion he claims that cumulative error requires relief. We have found reversible error for prosecutorial misconduct in Propositions I and II, reversible error in instruction in Proposition IV, and insufficient evidence to support the verdict in Proposition V. These errors, standing alone and in accumulation, require relief.

Decision

The Judgment and Sentence of the District Court is **REVERSED** and **REMANDED** for **ENTRY OF A VERDICT OF NOT GUILTY BY REASON OF INSANITY.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.:	CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.:	CONCUR IN RESULTS
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	SPECIALLY CONCUR

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART, DISSENT IN PART

I agree the issue of prosecutorial misconduct raised in proposition one requires relief. The prosecutor repeatedly crossed over the line of what could even arguably be called proper argument and, although I do not agree with all the syntax and analysis in the opinion, I do agree the cumulative effect of those comments cannot be said to be harmless in this case.

Also, I am also not opposed, in theory, to the idea of informing a jury of the consequences of a verdict of not guilty by reason of insanity, as addressed in proposition four. The opinion relies on the fact the Oklahoma Legislature passed "Truth in Sentencing" legislation to require giving an instruction on the procedure for someone found not guilty by reason of insanity. However, the opinion fails to mention that legislation was repealed shortly after it was passed. For that reason, our previous decision is still good, valid law. *See, Ullery v. State*, 1999 OK CR 36, 988 P.2d 352. Regardless, proper instruction, crafted by the Court of Criminal Appeals' OUJI-CR Instruction Committee, would likely be useful in assisting jurors with their decision and help prevent verdicts from being based upon fears of what might conceivably happen if they do not convict.

Therefore, I concur with the Court's opinion—to the extent that it grants relief on these two issues. But I part ways with the Court's resolution of proposition five, insufficiency of the evidence regarding Appellant's claimed insanity at the time, and I strongly dissent to the analysis of that issue and the remedy the Court fashions.

The proper remedy in this case is to reverse the judgment and sentence and then remand the case for a new trial. In that way, the questions of fact may be decided by a jury of the defendant's peers, rather than by a few judges who never saw the defendant or witnesses testify.

Here, eerily similar to the "sleight of hand" analysis recently used by the Court in reviewing mental retardation claims, the Court claims to be using a deferential *Spuehler*-based review. Thus, the Court would ask, after viewing the evidence in the light most favorable to the prevailing party (here, the State) and accepting all reasonable inferences and credibility choices that tend to support the jury's verdict (here, that Appellant was sane at the time of the trial), can we say that any rational trier of fact *could have found* Appellant sane when the crime occurred? *See Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204.

But a close reading of the Court's opinion demonstrates that what is actually happening here is *de novo* review, i.e., the Court is reviewing the facts as though no jurors had been involved, substituting its own view without giving proper deference to the jury's factual determinations.

The question of insanity is primarily a factual issue. The only legal component of that decision is the legal definition for insanity. Jurors take the factual evidence presented and make a determination of whether or not it fits within the legal definition, under proper instructions.

Judge Chapel's opinion in *Valdez v. State*, 1995 OK CR 18, 900 P.2d 363, 376 makes that point clear:

> Once the trial court makes the legal determination that the defendant has raised a reasonable doubt as to his or her sanity, the sanity issue becomes "a question of fact for the sole determination of the jury, ... [which] must

> consider all of the evidence presented, not merely the testimony of the expert witnesses...." [footnote omitted] In reviewing the jury's conclusion, this Court "will [neither] inquire into the credibility of the witnesses nor weigh conflicting testimony." [footnote omitted] Accordingly, we must uphold the jury's finding if there was sufficient evidence from which a rational trier of fact could have concluded that [the defendant] was sane when he murdered [the victim]."

(parentheticals added.) Judge Chapel later reiterated those same positions in *Cheney v. State*, 1995 OK CR 72, 909 P.2d 74, 85-86:

> "It is a well established rule that the question of whether the State has carried its burden of proving the defendant's sanity at the time of the crime is a question of fact for the sole determination of the jury and where there is any evidence tending to support its finding, it is not the province of the appellate court to weigh the same." [footnote omitted] The State can disprove insanity by lay testimony as well as expert testimony, and it is within the province of the jury to disregard the medical evidence and give greater weight to the lay testimony.

Here, however, the Court's Opinion does not take a deferential stance, but instead takes personal positions on witness credibility and weighs conflicting testimony. That is the sole responsibility of the jury under our Constitution.

The principals are not new. In *Wiswell v. State*, 55 0kl.Cr. 254, 29 P.2d 134 (Okl.Cr. 1934), the Court laid out similar ideals long ago:

> It is a fixed and settled rule that this court will not disturb a judgment, when to do so it must weigh the evidence and pass on the credibility of the witnesses. Those questions are for the jury. The rule has its basis in reason. The jury sees the witnesses, observes their demeanor and appearance on the stand, their candor and fairness or the lack thereof, and is in a better position to determine the weight and value of the evidence and the credibility of the witness than any appellate court could be. It was for them to say whether the witnesses for the state identifying the defendants as the persons committing the crime or the testimony of defendants and their witnesses on the question of alibi was true. Certainly, if the jury believed the state's testimony and did not believe the defendants' testimony tending to prove an alibi, as from the verdict returned they must have done, this court is not justified in interfering with the judgment.

While we are talking about a legal defense, not an alibi, in this case, the rules regarding a jury's factual determinations are the same.

This issue caused serious debate during the formation of our Federal Constitution. To alleviate the fears an appellate court would abuse its power and overturn the fact finding of a jury, Alexander Hamilton wrote in The Federalist No. 81

> But it does not follow that the re-examination of a fact once ascertained by a jury, will be permitted in the supreme court. Why may it not be said, with the strictest propriety, when a writ of error is brought from an inferior court to a superior court of law in this state, that the latter has jurisdiction of the fact, as well as the law? It is true it cannot institute a new enquiry concerning the fact, but it takes cognizance of it as it appears upon the record, and pronounces the law arising upon it. This is jurisdiction of both law and fact, nor is it even possible to separate them. . . . I contend therefore on this ground, that the expressions, 'appellate jurisdiction, both as to law and fact,' do not necessarily imply a reexamination in the supreme court of facts decided by juries in the inferior courts.

It is interesting that some 218 years later we must deal with the same fears that Courts will not exercise the self-discipline required to function in their limited role as a part of our Republic. While this Court is well within its role to interpret and apply the law, it must exercise the self-discipline to be bound by the facts as determined by the trier of fact. If a jury has not been properly instructed on the law as to how they should apply their determination of the facts and evidence in the case, then the proper remedy is to remand the case for retrial under a proper instruction of the law.

Based upon the errors that occurred in this trial and even conceding that Appellant was entitled to an improved jury instruction on the consequences of a not guilty by reason of insanity finding, I would reverse and remand for a new trial. We are not jurors, and it is dangerous when we start believing we are.

LEWIS, JUDGE, SPECIALLY CONCURS:

I cannot concur with the opinion insofar as it takes away from the jury the issue of the appellant's sanity at the time that these horrible crimes were committed. This court's prior opinions have held that this is a jury question. I would reverse this matter due to prosecutorial misconduct for a new trial.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 00-7030
(D.C. No. 97-CV-386-S)
(E.D. Okla.)

[Filed February 27, 2001]

DANIEL C. KISER,
Petitioner-Appellee,

v.

BOBBY BOONE; ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,
Respondents-Appellants.

ORDER AND JUDGMENT[*]

Before **EBEL**, **KELLY**, and **LUCERO**, Circuit Judges.

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[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Respondent-appellant Warden Bobby Boone appeals the district court's order granting petitioner-appellee Daniel C. Kiser's habeas corpus petition brought under 28 U.S.C. § 2254. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I. Background Facts

On the evening of January 9, 1983, one day after his former wife, Barbara Lee, filed for divorce, Mr. Kiser drove to the home of her boyfriend, Dewey Glen Hines, and shot him with a .357 revolver. Prior to the shooting, Mr. Hines had called the police and reported a prowler. When the police arrived, Mr. Kiser was outside the home and the police assumed he was the homeowner. Before the police could investigate further, Mr. Kiser walked to the front door and shot Mr. Hines as he opened the door. The police and Ms. Lee witnessed the shooting. After shooting Mr. Hines, Mr. Kiser dropped the gun, fell to his knees, and cried, "Oh, my God."

In May 1983, Mr. Kiser was confined in Central State Hospital for treatment of extreme depression. He remained there for approximately eleven months. On May 2, 1984, the trial court ordered Mr. Kiser committed to Eastern State Hospital on the state's motion to determine his competency to stand trial.

After twenty-five days, Mr. Kiser was released from the hospital as competent to stand trial.

The main issue at trial was not whether Mr. Kiser had killed Mr. Hines, but whether he was sane at the time. The jury rejected Mr. Kiser's insanity defense and returned a verdict of murder in the first degree. On direct appeal, the Oklahoma Court of Criminal Appeals determined, *inter alia*, that the evidence was sufficient to find Mr. Kiser sane at the time of the shooting. *Kiser v. State*, 782 P.2d 405, 407 (Okla. Crim. App. 1989). Mr. Kiser sought state post-conviction relief, alleging that he had new evidence that the state's expert witness as to his sanity, Dr. Garcia, was himself suffering from a mental illness. Without addressing Mr. Kiser's claim that Dr. Garcia was incompetent to testify, the state court denied relief, concluding that the issue of his sanity had been raised and ruled on in Mr. Kiser's direct appeal.

In his § 2254 federal habeas corpus petition, Mr. Kiser alleged that there was insufficient evidence for the jury to find he was sane at the time of the shooting, and the jury relied on incredible and unreliable testimony from Dr. Garcia. The magistrate judge found that there was insufficient evidence for a jury to find Mr. Kiser sane beyond a reasonable doubt and granted his habeas petition on that basis. The district court adopted the findings and recommendation of the magistrate judge, giving the state 120 days to retry or release Mr. Kiser. The state appeals.

II. Standard of Review

The issue before this court on appeal is whether there was sufficient evidence presented at trial to support the jury's verdict that Mr. Kiser was sane at the time he shot Mr. Hines. Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (1996), a writ of habeas corpus may not be issued with respect to any claim adjudicated on the merits in state court unless that adjudication:

> (1) . . . was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) . . . was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

§ 2254(d)(1)-(2).[1] Section 2254(e)(1) further requires a habeas court to presume that factual determinations made by the state court are correct, and places the burden on the petitioner to rebut that presumption by clear and convincing evidence. Federal habeas relief may only be granted where

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[1] If a claim was not adjudicated on the merits in state court, "and the federal district court made its own determination in the first instance, we review the district court's conclusions of law de novo and its findings of fact, if any, for clear error." *Van Woudenberg ex rel. Foor v. Gibson*, 211 F.3d 560, 566 (10th Cir. 2000) (quotation omitted).

> the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law; decided the case differently than the Supreme Court has on a set of materially indistinguishable facts; or unreasonably applied the governing legal principle to the facts of the prisoner's case.

Van Woudenberg ex rel. Foor, 211 F.3d at 566 (*citing Williams v. Taylor*, 120 S. Ct. 1495, 1523 (2000)). We must be convinced that the erroneous or incorrect application of the law was also objectively unreasonable. *Williams*, 120 S. Ct. at 1521-23.

III. Discussion

The *M'Naghten* rule is the test for sanity in Oklahoma. Okla. Stat. tit. 21, § 152. Under this rule,

> [t]he initial burden is on the defendant to establish a reasonable doubt as to his sanity. If the defendant establishes a reasonable doubt of his sanity, the presumption of sanity vanishes and it is incumbent upon the State to prove beyond a reasonable doubt that the defendant could distinguish between right and wrong at the time of the offense.

Clark v. State, 718 P.2d 375, 377-78 (Okla. Crim. App. 1986) (internal citation omitted). In Oklahoma, it is well established that the issue of insanity at the time a crime is committed is a question of fact for the jury.

Id. at 378. "[W]here there is any evidence tending to support the finding it is not the province of the [state] appellate court to weigh the same." *Id.* (quotation omitted).

> In determining the issue of insanity, the jury must consider all of the evidence presented, not merely the testimony of the expert witnesses, and the weight and credibility of expert opinion is for the jury to determine and such testimony is not conclusive even where it is uncontroverted. The jury must determine the weight and credibility of both expert and lay witnesses in light of the particular facts and circumstances shown in the case.

Id.

The defense presented expert testimony from Dr. Laurel Van Horn, a psychologist who had Mr. Kiser in group therapy twice a week during his eleven-month confinement at Central State Hospital following the shooting. Dr. Van Horn testified that, at the time of the shooting, Mr. Kiser "was a borderline personality . . . in the midst of a psychotic decompensation." R. Vol. IV at 659. She further defined the diagnosis as one that

> largely involves unstable emotional behavior, marked shifts, going from very angry to reasonably normal to angry to depressed. Depression is a large component and abandonment depression is a large component of the diagnosis. Compulsive acts is another component of the diagnosis. It's primarily a

> diagnosis for those people who are extremely vulnerable, to psychotic decompensation under situations of separation and loss.

Id. She testified that on the night of the shooting, Mr. Kiser had a "disassociated reaction" rendering him "amnesic" with little or no memory of the events of the shooting. *Id.* at 660-61. She concluded that at the time he shot Mr. Hines, Mr. Kiser was not "in his right mind," could not "distinguish . . . between right and wrong," and was "legally insane." *Id.* at 658.

Dr. James Behrman, a psychiatrist retained by the defense, testified at trial based on his review of Mr. Kiser's hospital records and family history and two personal interviews. He agreed with Dr. Van Horn's assessment that at the time of the shooting Mr. Kiser did not have control over his actions, did not know right from wrong, and was legally insane. *Id.* Vol. V at 725.

The prosecution's expert witness, Dr. R.D. Garcia,[2] a psychiatrist at Eastern State Hospital, testified that when he saw Mr. Kiser five days after the shooting, he had "no mental disorder." *Id.* at 814. When asked, however, whether he found "any evidence of psychosis," he stated that he found "[d]epression reaching psychotic proportions." *Id.* at 817. He said that Mr. Kiser was "pleading what they call, post-traumatic amnesia," either voluntary or involuntary, and was unable to recall the shooting incident with any specificity. *Id.* at 818. Dr. Garcia testified that he saw Mr. Kiser for approximately two to three hours over a three-week period. When asked whether, in his opinion, Mr. Kiser could distinguish between right and wrong at the time of the shooting, he replied that he did not know because that was not what he was asked to assess. He stated that "[i]t would cost you more money if you want me to find out." *Id.* at 821. He opined that it was not the responsibility of a psychiatrist to make that determination, and that he had seen very few cases where insanity could be determined by a psychiatrist who was not present at the time the crime was committed. *Id.* at 822. Moreover, he stated that a defense of "temporary insanity" was "nonsense," and a "cop out."[3] *Id.* at 823, 825. Dr. Garcia testified that the purpose of his examination of Mr. Kiser was to determine whether he was competent to stand trial. *Id.* at 837. Although Dr. Garcia testified that it was possible for Mr. Kiser's depression and "psychotic break" to render him unable to distinguish between right and wrong, *id.* at 839, he did not assess Mr. Kiser's mental state at the time of the shooting, *id.* at 840.

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[2] Mr. Kiser alleged in his habeas petition that Dr. Garcia's testimony should be discounted as unreliable and incredible because Dr. Garcia, himself, was suffering from severe bipolar disorder at the time he testified. As Mr. Kiser points out, this court has previously addressed Dr. Garcia's illness in relation to testimony offered in court. *See Williamson v. Ward*, 110 F.3d 1508, 1519 (10th Cir. 1997) (noting that the record contained affidavits describing Dr. Garcia's behavior as bizarre and stating that, in its severe form, Dr. Garcia's illness could "impair and distort his diagnostic judgment"). Due to our determination in this case that there was insufficient evidence upon which the jury could have found Mr. Kiser sane beyond a reasonable doubt, we have no reason to address the possibility that Dr. Garcia was mentally ill. We also note that Dr. Garcia died in 1986 before his illness could be conclusively diagnosed.

On appeal, the state contends that the testimony of the defense experts, Dr. Van Horn and Dr. Behrman, was weak and inconsistent. Specifically, the state asserts that Dr. Van Horn's testimony was weakened because she did not treat Mr. Kiser on an individual basis, she was new to the profession having been licensed in 1979, she was testifying as an expert for the first time, and she admitted that Mr. Kiser was not being treated with anti-psychotic drugs during his stay at Central State Hospital. The state also challenges Dr. Van Horn's testimony that, although she was unaware of the facts surrounding the shooting incident, they would not alter her opinion.

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[3] We note that Dr. Garcia's testimony was often rambling and without cohesiveness. *See, e.g.*, R. Vol. V at 810-11, 825-26. In fact, the prosecutor apologized to the jury during his closing argument for his inability to control Dr. Garcia. *Id.* at 859.

The state contends that Dr. Behrman's testimony was weakened because his observation of Mr. Kiser was limited to two one-hour interviews and his testimony was based on an "irresistible impulse" theory which is not recognized as a test for insanity in Oklahoma. It argues that his opinion was further eroded when he stated that knowing that Mr. Kiser planned the shooting and showed remorse afterwards could affect his opinion that Mr. Kiser did not know right from wrong at the time of the shooting.

Even if we agree that the testimony of these experts was weakened by these limiting factors, we cannot agree with the state that Dr. Garcia's testimony successfully refuted that of Drs. Van Horn and Behrman. It is true that Dr. Garcia attacked their opinions, but he did so with very little professional credibility. All Dr. Garcia established is a general difference of opinion in the profession as to diagnosis and treatment. He admitted that he had never evaluated Mr. Kiser to determine what his mental state was at the time of the shooting.

Ms. Lee testified that Mr. Kiser was very upset over the pending divorce. Following defense objection and a bench discussion of admissibility, the court allowed Ms. Lee to testify that on January 2, 1983, she had received a telephone call from Mr. Hines during which he told her that Mr. Kiser had called and threatened him. On January 7, 1983, the day Ms. Lee filed for divorce, she testified that Mr. Kiser came to her house, would not let her leave, pulled the telephone from the wall, was "acting very strange," and threatened to kill himself. R. Vol. III at 513. He had a small gun with him which he kept holding to his head. He remained at her house from 6:30 p.m. to approximately 4:00 a.m. during which period they continued to talk about the divorce. He returned a little later and kicked in the door. At this point, Mr. Kiser wanted Ms. Lee to go with him to Mr. Hines' house so he could "shoot [Mr. Hines] in front of [her]." *Id.* at 517. She managed to calm him down and he eventually left. On cross-examination, she offered that his behavior was "irrational," that he wasn't his normal self, and that he needed mental help. *Id.* at 539. The court sustained the prosecution's objection to Ms. Lee's testimony that Mr. Kiser's behavior appeared "crazy." *Id.* Vol. IV at 549-50. She was, however, allowed to testify that his anger was "abnormal."[4] *Id.*

There was additional lay witness testimony from Mr. Hines' neighbor, Bill Hawkins, indicating that when Mr. Kiser stopped at his house to ask where Mr. Hines lived, he appeared "nice" and "polite." *Id.* at 561. Mr. Hines' friend, J.B. Phillips, testified to a conversation he had with Mr. Hines during which Mr. Hines confided his concern about a telephone call from Mr. Kiser threatening to kill him. *Id.* at 567-68. The state asserts that the testimony of Dr. Garcia and the testimony of these lay witnesses was sufficient to rebut the testimony of the two defense experts. We do not agree.

In considering Mr. Kiser's challenge to the sufficiency of the evidence supporting the jury's determination of sanity, the Oklahoma Court of Criminal Appeals noted that lay witness testimony established that Mr. Kiser threatened to kill Mr. Hines a week before the shooting; he threatened to kill himself the night before the shooting; his wife described "his anger as not normal;" he asked a neighbor where Mr. Hines lived and what kind of car he drove; and he exhibited remorse after the shooting. *Kiser*, 782 P.2d at 407. The court found that Dr. Garcia had refuted the testimony of the two defense experts and that "[v]igorous cross-examination revealed the weaknesses in the testimony of each of the experts." *Id.* Declining to reweigh the evidence, the court found Mr. Kiser's sufficiency challenge to be meritless. *Id.*

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[4] On appeal, the state appellate court concluded that exclusion of Ms. Lee's testimony regarding her opinion of Mr. Kiser's sanity was error, albeit harmless. *Kiser*, 782 P.2d at 410-11.

In recommending that habeas relief be granted, the magistrate judge stated that, although the state appellate court gave great weight to Dr. Garcia's testimony, it was clear that he had not evaluated Mr. Kiser to determine his mental condition at the time of the shooting. The magistrate judge also noted that even though the state court found the testimony of the two defense experts to be weakened on cross-examination, it was clear from the record that the two experts continued to maintain that Mr. Kiser was insane at the time of the crime. He also noted that the lay testimony did not address the issue of Mr. Kiser's sanity at the time he shot Mr. Hines.

In Oklahoma, "[t]he State can disprove insanity by lay testimony as well as expert testimony, and it is within the province of the jury to disregard the medical evidence and give greater weight to the lay testimony." *Cheney v. State*, 909 P.2d 74, 86 (Okla. Crim. App. 1995). In *McKenzie v. United States*, 266 F.2d 524, 526-27 (10th Cir. 1959), we said that "[b]efore a non-expert witness is competent to testify to the sanity or insanity of another person, he must show an acquaintance of such intimacy and duration as to clearly indicate that his testimony will be of value in determining the issue." *See also United States v. Madrid*, 673 F.2d 1114, 1123 (10th Cir. 1982); *United States v. Coleman*, 501 F.2d 342, 345 (10th Cir. 1974).

Here, Bill Hawkins offered no opinion as to Mr. Kiser's sanity, but only testified to his very short observation of Mr. Kiser while giving him directions. J.B. Phillips obviously had never met Mr. Kiser and his only testimony was concerning Mr. Hines' recount of a threatening call he received from Mr. Kiser. On the other hand, Ms. Lee's testimony that Mr. Kiser's behavior before and after the shooting was "strange" and "abnormal" was based on her intimate relationship with Mr. Kiser as his wife. Finally, although Dr. Garcia disagreed with the professional approach of the two defense witnesses, he did not render an opinion as to Mr. Kiser's mental state at the time of the shooting.

Here, we determine that the testimony of Drs. Van Horn and Behrman, whose duty it was to determine Mr. Kiser's mental condition, was overwhelming in light of the state's insufficient and indefinite evidence of his sanity. We conclude that the district court was correct in its determination that there was insufficient evidence to support the jury's determination that Mr. Kiser was sane at the time of the shooting.

Therefore, the judgment of the United States District Court for the Eastern District of Oklahoma, granting Mr. Kiser habeas corpus relief on the issue of his sanity, is AFFIRMED. Mr. Kiser's "Motion By Petitioner/Appellee For Acquittal And To Bar Retrial, To Require Expungement And Sealing Of Records, And To Acquit Petitioner/Appellee Of Bryan County Court Costs And To Require Return To Petitioner/Appellee Of All Court Costs Paid To Bryan County Court" is premature and is therefore DENIED without prejudice subject to refiling in the district court.

Entered for the Court

David M. Ebel
Circuit Judge